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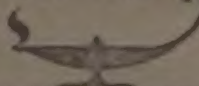
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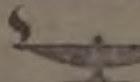
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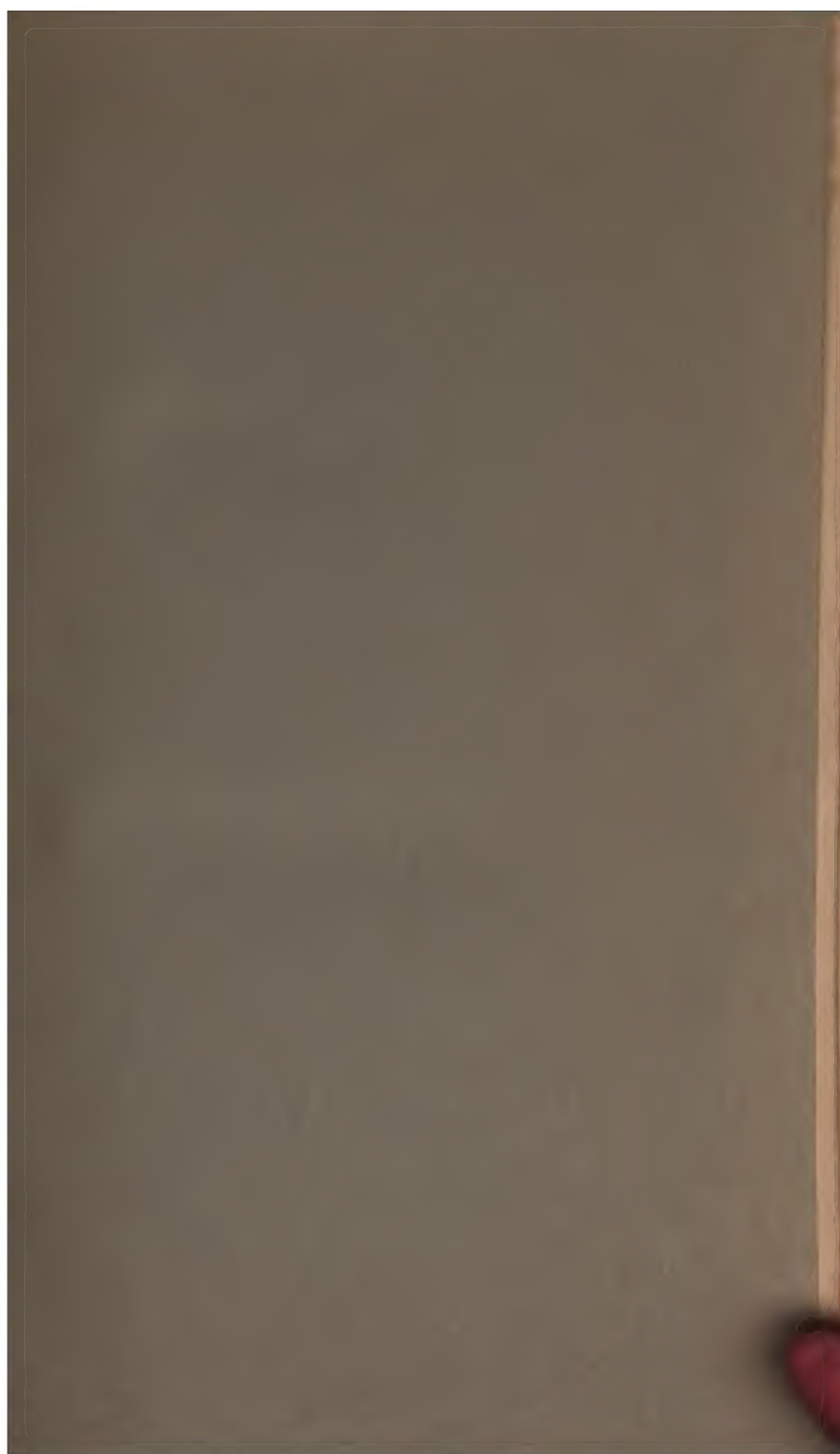
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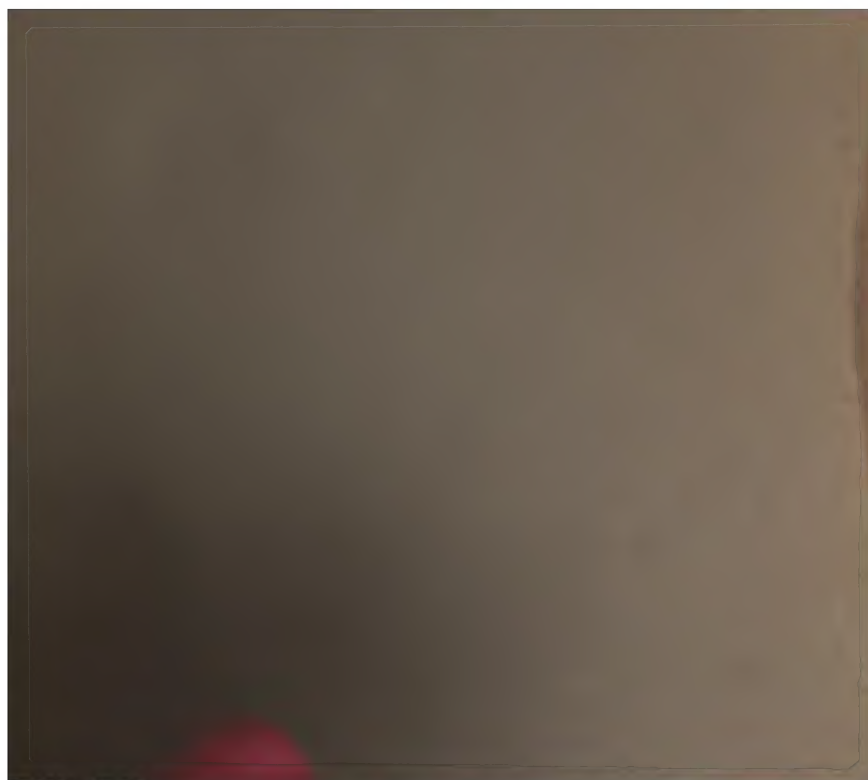
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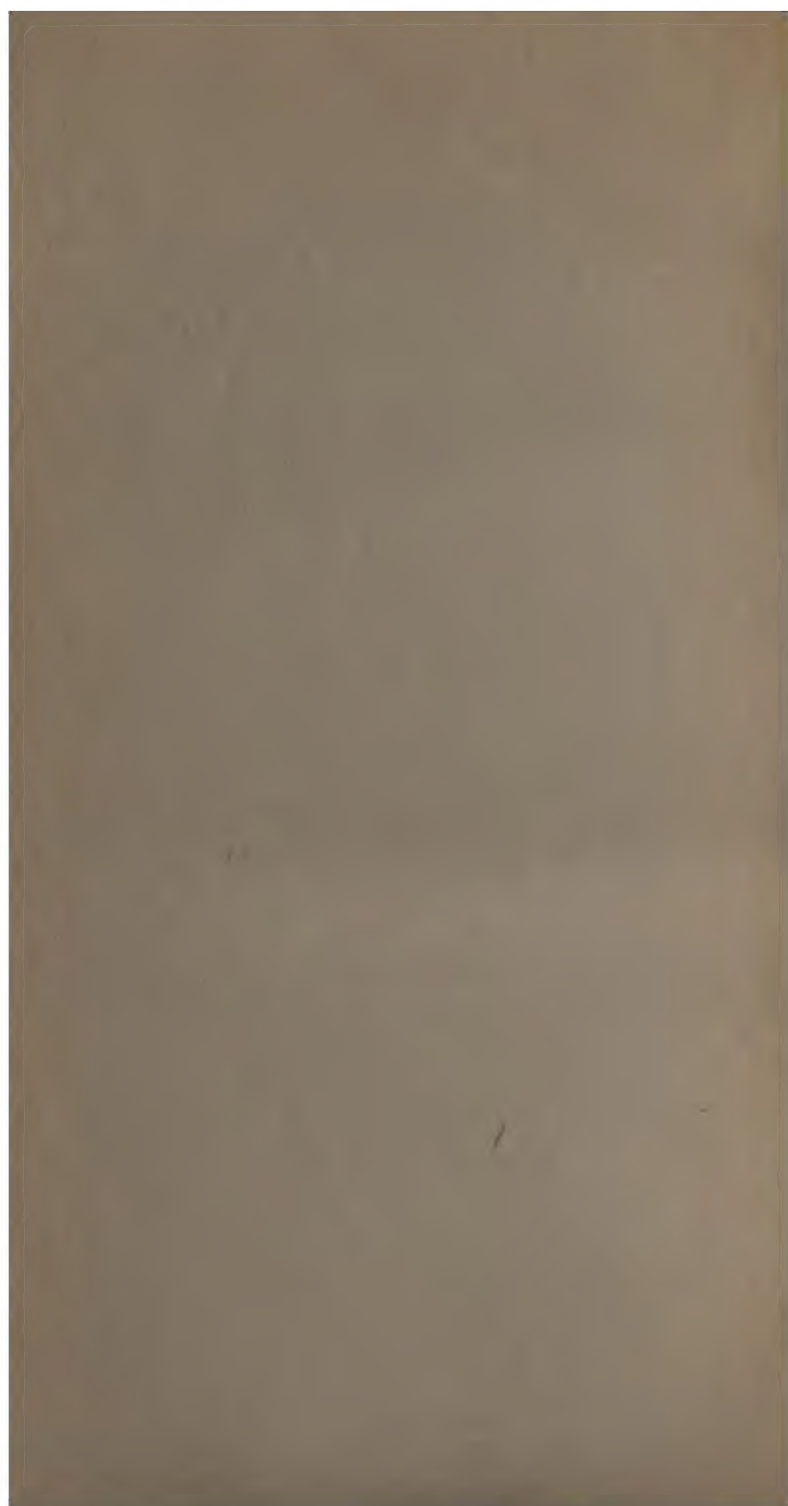
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**RATIONALE**  
OF **38366**  
**JUDICIAL EVIDENCE,**

SPECIALLY APPLIED TO

**English Practice.**

FROM THE MANUSCRIPTS OF

**JEREMY BENTHAM, Esq.**

BENCHER OF LINCOLN'S INN.

IN FIVE VOLUMES.

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## BOOK IX.

### ON THE EXCLUSION OF EVIDENCE.

#### PART III.

VIEW OF THE CASES IN WHICH EVIDENCE HAS  
IMPROPERLY BEEN EXCLUDED ON THE GROUND  
OF DANGER OF DECEPTION.

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#### CHAPTER I.

##### CASES ENUMERATED.

IN regard to evidence, admission, non-exclusion (it has already been shewn), is the general rule. Evidence is the basis of justice: exclude evidence, you exclude justice.

The propriety of the general rule being so conspicuous; whatever be proposed in the character of an exception, the *onus probandi*, in respect of the propriety of it, lies upon the proposer of the exception; upon the exclusionist. In the last preceding book, this task has been performed.

If, as above supposed, in the account stated in the preceding book, the entire list of the cases in which exclusion of evidence can be

to a learned eye, is too minute to have any claim to notice.

In practice, they had been confounded: so happily confounded, that, when a statute had required that a witness or witnesses should be *credible*, it was a matter of doubt whether credibility was or was not the same as competency. Instead of talking of credibility, speak of *inadmissibility*, non-admission, or exclusion; instead of competency, speak of *admissibility*, admission, and non-exclusion; you could then be understood without difficulty: the difficulty would then be in contriving how to misunderstand you. But, well suited as such clearness would have been to the purposes of common sense and common honesty, it would have been proportionably ill suited to the purposes of common law. The absurdity of the arrangement was in some measure hidden from view, by the cloud which hung over the language. Prevented from knowing so much as what it was that was done, non-lawyers were the more effectually prevented from seeing into the irrationality and mischievousness of what was done: and, upon this part of the ground as upon every other, the rubbish thrown up by the lawyers, while working and fighting in the dark, contributed its part to thicken the entrenchment which defends the garrison of the old castle of chicane.

Deception, and vexation, have already been mentioned as the two inconveniences, in the apprehension of which (in so far as any reason, or so much as the slightest colour of a reason, has ever been assigned or glanced at) the exclusionary system, in what cases soever it has been applied, has had its root.

Exclusions grounded on the consideration of

exation, form the matter of the next succeeding Part.

The present Part is appropriated to the consideration of those examples of exclusion, in which the fear of deception has been the ground, real or ostensible.

*Incorrectness*, and *incompleteness*. In these two expressions may be included all the properties, by means of which it can happen to the testimony of a witness to produce deception in the bosom of the judge.

If, in respect of either or both these qualities, there be any failure on the part of the witness, the root or cause of it will be to be found either in the will, or in the understanding; in the volitional, or the intellectual, branch of his mental frame. With relation to the result here in question, the state of those faculties respectively may be said to be an *unfit* one.

When, on the part of the testimony, incorrectness or incompleteness in any degree has its source in an unfit state of the will, *interest*, sinister interest is the cause of it: when in an unfit state of the understanding, *imbecility*.

Our business, at present, is to bring to view, not so much what ought to have been, as what has been, done and thought.

Topics different in appearance, though in effect coincident, have been, in the existing systems, substituted or added to the above. Qualities or acts considered as blemishes upon the moral character of the proposed witness, have, in a variety of instances, been considered as grounds of exclusion. For the designation of all these, one word, *improbability*, may on occasion serve.

But *improbability*, on what score does it present itself, in reality or in appearance, as constituting a proper ground of exclusion? and what relation, if any, does improbity bear to interest?

One answer will serve for both these questions.

Interest, when acting in such a direction and with such effect as to give birth to falsehood, may be termed *sinister* interest. The effect of improbity is to render a man, in proportion to the degree of it, more and more apt to be led into falsehood by the force of sinister interest.

Thus it is that improbity, considered as a ground of exclusion, coincides with, and is included in, the ground expressed by the word interest. Be it lying, be it what it will, no man does any thing wrong, any more than right, without interest, without a motive. Suppose every thing capable of acting in the character of a motive in a mendacity-prompting direction, out of the question, a man of the most profligate character will be no more likely to deliver false testimony, than an average man taken at large.

Under the head of improbity may be included, to the present purpose, that of religion. Improbability has been generally ascribed to a man on the supposition of his having no religion, or having a bad one. Religion has, accordingly, furnished pretences for refusing to hear evidence: with what reason, will be seen in its place. He who is considered as having no religion, no God, is termed an atheist; he whose religion is bad, whose God is considered as a bad one, whose notions concerning God are considered as bad notions, has been termed a

*cacoth*eist. Subordinate to the head religion, *atheism* and *cacoth*eism may, accordingly, constitute two distinguishable heads.

Subordinate, in like manner, to the more extensive head of imbecility, we shall find three particular heads: infancy, dotage or superannuation, and insanity (including casual mental debility).

By reason of infancy, and to the extent of the age denoted by that word, every man is kept in a state of relative imbecility. In the course of his life, every man is subject to have his intellectual faculties more or less disturbed and weakened by mental debility (whether caused by bodily debility or not); and, towards the close of it, by dotage.

Putting together these several articles, we have eight general heads, under which the circumstances that have been employed as grounds or pretences for putting exclusion upon evidence may be ranked: viz.—

1. Interest. Sinister interest of all sorts without distinction.
2. Pecuniary interest.
3. Improbability at large.
4. Atheism.
5. Cacotheism.
6. Infancy. Imbecility in respect of infancy.
7. Insanity.
8. Dotage.

In the former set of cases which have just been under our review, we have seen but little work, in the way of exclusion, for the providence of the legislator; and of that little, the greater part left every where undone. In the set of cases now coming under review, we shall

see nothing at all, in point of propriety, to be done in that same way by the providence of the legislator; and at the same time in point of fact we shall see him (or rather his substitute, his essentially and everlastingly incompetent substitute, the judge) at work every where, in all directions, and with a sort of activity as pernicious in effect as it is rash and unwarranted in principle.

## CHAPTER II.

DANGER OF DECEPTION, NOT A PROPER  
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against misdecision.*

**MISDECISION** is the word to be used in this place, not *deception*. Why? Because in misdecision consists the mischief, the only mischief. Suppose deception, and yet no misdecision, there is no real mischief: suppose misdecision, yet no deception, the mischief is as great as if deception had been the cause of it.

Deception supposes conception: previous hearing, or what is equivalent. The judge who should ascend the bench with a resolution never to hear any body, would conduct himself badly enough; but in no case could it be said of him that he had been deceived. Misdecision, as many instances of it as there were causes endeavoured to be brought before him: misdecision, in abundance; deception, none.

The first thing to be done, then, is to shew that, on whatever ground exclusion may be placed, it is not in the nature of it to afford any security against misdecision. This accomplished (if it be accomplished); the remainder

of the book, were all minds upon a level with the highest, would be but *actum agere*. But the mind of the public is not so easily satisfied: prejudice is not eradicated upon such easy terms.

In every case, the evidence (whatever it be) which it is on any side proposed to produce, is either necessary, or less than necessary, to the decision prayed for on that side: say (to take the clearest example), the only evidence, or not the only evidence, on that side.

1. In the first place, let it be necessary.

Exclusion, if put upon necessary evidence, produces, if the evidence would have been true, a certainty of misdecision: deception, supposing it to have taken place, can do no worse. But no man surely will be found who will either think or say, that, of falsehood (supposing the evidence false), deception will in any one instance be a certain consequence. To say this, would be as much as to say, every judge is a machine. What, then, is the effect of exclusion? To produce, for fear of an uncertain mischief,—to produce to a certainty, and in the first instance, the very mischief which it professes to avert. It is as if a copyist, considering that he now and then makes mistakes, should, for greater security against incorrectness, determine never to copy any more but in the dark.

What, then, would the lawyer be with his exclusionary remedy, supposing he were sincere? He would be like the panic-struck bird, which, for fear of the serpent, flies into its mouth.

What should we say of a lottery, at 20*l.* a ticket, so many blanks to a prize, 20*l.* the highest prize?—20*l.* paid to purchase a chance of 20*l.*? Among non-lawyers, where is the man to be found that would be weak enough to make such a lottery, weak enough to put into it if made? The learned judge who shuts the door against evidence, to save himself or Co. from being deceived by it, makes exactly such a lottery, and buys tickets in it. He buys tickets in it: but with whose money? Not with any of his own money, indeed: no, truly, he knows better things: but with the money of suitors.

Rapax owes you 20*l.* that he borrowed of you: *Oculatus Suspectus* was present at the transaction: his evidence is the only proof you have of it. If the judge refuses to hear *Oculatus Suspectus*, misdecision to your prejudice is the certain consequence; your money is gone.

You borrowed 20*l.* once of Rapax; he has abundant evidence of it: but you paid him: *Oculatus Suspectus* saw you pay him: of this payment, his testimony is the only evidence. If the judge refuses to hear *Oculatus Suspectus*, misdecision to your prejudice is the certain consequence: here, too, your 20*l.* is gone.

On the other hand, suppose, in either case, *Oculatus* to be a false witness: is deception on the part of the judge, is misdecision and wrongful disposal of the money, a certain consequence? Nothing like it. Every day, false testimony is delivered: every day, false testimony is detected.

2. Next and lastly, let the evidence in question be less than necessary. Being not absolutely necessary, it must be because there is other evidence on that same side. In this case, though the evidence be excluded, misdecision is not the certain consequence.

But in this case, the party who adduces the evidence having other evidence sufficient to warrant a decision in his favour, there is nothing gained by the exclusion. Excluding the evidence, you decide in favour of the party who produces it; what could you have done more, if you had admitted it?

Not that, in this case, the exclusion is merely nugatory. It imposes upon the party on whose side the evidence was produced, the additional delay, vexation, and expense, of procuring other evidence; and if these exceed his means, he loses his cause, and misdecision, or failure of justice, is the consequence.

In neither case, therefore, can the exclusionary system be conducive to the ends of justice.

Of the apprehended danger of misdecision from the receipt of evidence of a comparatively untrustworthy kind, what is the amount and value? In every case, either nothing or next to nothing. The legislator is sufficiently upon his guard against it; indeed, more than sufficiently: and so much more than sufficiently, as to prohibit the reception of it without knowing what it is. But being himself so much more than sufficiently upon his guard, what ground can he have for the apprehension that the judge, on his part, will be less than sufficiently upon his guard? The judge who, with such warning as may be given him by the legis-

later in the way of *instruction*, is not sufficiently proof against that deception against which the legislator has thus been so sufficiently upon his guard without warning, ought not to be deemed qualified for his office.

From the precautions taken by lawyers, who would not have supposed that the danger was all of it on one side? That, while it is an event unhappily so frequent for false testimony to obtain a credit that is not its due, it was a misfortune that could never happen for true testimony to fail of obtaining the credit that is its due? Yet, in point of fact, who is it that can be assured, that, in a case so open to general suspicion as most of those to which the exclusionary rules refer, it may not have happened as often to true evidence to be disbelieved, as to false evidence to be believed? Fortunately for mankind, the nature of things does not admit of any such drastic remedy against the former misfortune, as the quackery of lawyers has employed against the latter.

The witness in question, supposing him to have been admitted, would either have been disbelieved or believed. In the first case, the rule is superfluous and useless. All the use of it consists in warding off a danger, which, the event shews, would not have been realized.

Wherever the witness, if admitted, would have been believed, observe the consequence; observe the ground, in point of reason, upon which the law rests. The jury, who have seen the witness; who would have heard his whole story; who would have heard him cross-examined, and had the opportunity of cross-

examining him themselves; who would have heard the other witnesses, if there were any; who would have seen who and what the defendant and the prosecutor are; and who would have observed the whole complexion of the case; the jury, who would have had the benefit of the observations of the counsel and the judge; would have believed his relation to be true. The law, which has not seen the witness, which knows nothing of accused or prosecutor, which, in a word, knows nothing of the case, pronounces him unfit to be believed; and so unfit, and the danger of hearing him so great, that, rather than run the risk, it chooses, as the lesser evil, to license the commission of all sorts of offences in his presence. When I said the *law*, I might have said the *judge*; the single judge, to whose partial and hasty conception, hurried away and engrossed by some particular incident in the particular case before him, it first occurred to lay down such a rule.

All this while, the admission of a witness,—the disallowance of the rule which, on the ground of any supposed objection to his veracity, forbids him to be heard,—would not preclude the production of the ground of objection, whatever it may be; the record (for instance), or other evidence, proving his having been convicted of a crime reputed infamous. Wherever the production of such ground of objection would have had the effect of preventing the jury from crediting his evidence, the rule is superfluous and useless. The only case where it has any effect is that in which, after hearing the objection

against him, they were to be satisfied of its being insufficient and inconclusive, and to credit his testimony notwithstanding.

Against danger of misdecision, resulting from the admission of a lying witness, or rather of a witness disposed to lie, there are abundant remedies. There is the natural sagacity of the jury; there is the cultivated sagacity of the judge; there is the perhaps equally cultivated, and still more keenly sharpened, sagacity of the counsel for the defendant; there is, in penal cases (especially in cases of the most highly penal nature), the candour of the counsel for the prosecution. For (though, in cases of guilt, the more flagrant the guilt, the greater the glory and thence the greater the zeal of the defending counsel), what counsel ever presses for a conviction, in a case any way serious, of a defendant of whose innocence he is himself assured? Besides all these securities, there is in this country, after all, the mercy (which in this case would be but the justice) of the crown.\*

Where is the consistency between this utter distrust of juries, and the implicit faith bestowed,

\* The case of Mac Daniel and Egan, the treacherous thieves, or blood-conspirators, will strikingly illustrate the difficulty of obtaining credence in a court of justice for a false story. The blood of the innocent was, in the estimation of these monsters in iniquity, a price not too great to be paid for the illicit gain. The reward was to be obtained at any price; but how was it to be obtained? Not even here by perjury; but by a course still more oblique, and which recommended itself to those veteran practitioners in criminal law as more feasible and more safe. The crime was first to be produced, in order to be related. An imaginary crime

with so much affectation, on the decisions they are permitted to give on such evidence as they are permitted to receive? When a parcel of people you know nothing of, except that they are housekeeping tradesmen, or something of that sort, are got together by hap hazard, or by what ought to be hap hazard, to the number of twelve, and shut up together in a place from whence they cannot get out till the most obstinate among them has subdued the rest; political orthodoxy commands them to be looked upon as infallible. I have no great opinion of human infallibility; and if it were necessary to believe in it, I would go to work by degrees, and begin with the Pope. All I contend for (but this I do contend for) is, that these twelve men, whoever they are, that have heard what the witness had to say, heard him examined and cross-examined, and examined him themselves as long as any of them thought proper, are more likely to judge right as to whether he has spoken truth or no, than a judge, who lived

would not have served their purpose. The difficulty of framing a tale of this kind, which, though false, should stand the action of counter-interrogation and the other tests, and obtain credit as if it were true, was too formidable to be encountered. Their plan was, first to engage a man really to commit a crime, of the circumstances of which they were apprized: for the convenience of having memory to draw upon, and not mere imagination, in the picture which the prosecution of their scheme called upon them to give of it at the trial, in the character of witnesses. Those who were not to be withheld by any other consideration, were thus withheld from the engaging in a system of perjurious depredation by the thoroughly understood and continually contemplated difficulty and danger of the attempt.

centuries ago, who never set eyes on the man, nor ever heard a syllable from or about him in his life, is likely to judge right on the question whether the man would say true or no if he were to be heard. If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence: if they are not fit to be trusted with this, not even with the benefit of the judge's assistance and advice, what is it they are fit to be trusted with? Better trust them with nothing at all, and do without them altogether.

A question continually started to the jury by the judge is,—do you believe this evidence?—and it happens but too often that the verdict declares the negative. Indeed, little less of their attention is occupied in determining with themselves who is to be believed, than in drawing inferences from the evidence on which their belief has been bestowed. In all these instances, false evidence is poured in upon them, without the smallest mark to distinguish it from the true. In all the cases of exclusion, the witness presents himself with a mark upon his forehead, pointing out the reason there is for looking upon his evidence as likely to prove false. If he did not, there would be no ground for shutting the door upon him. *Habet fœnum in cornu.* Are men more in danger of being deceived when they have warning given them, than when they have none?

But, when the testimony of a witness, being false, is not believed, the very falsehood itself is a source of instruction, and security against misdecision.

Misdecision, be it never out of mind, is the only real evil ; falsehood, unless in so far as it produces misdecision, none at all. Yet, to no such object as misdecision is the eye ever directed by lawyers : of no such word is any trace to be found in their books. Falsehood is the great and only object of all fears. What ? would you lend an ear to falsehood ? Why not, if from falsehood you can obtain a clue that guides to truth ? Instruction ? do you think to derive instruction from a liar ? Why not, as well as from any other enemy ?

In what other case can you be so sure of hearing falsehood, as when you have to take the examination of a notorious and professional malefactor, on the occasion of some offence of which he stands accused ? Yet, the surer you are of hearing from him all such falsehoods as promise to suit his purpose, the more instructive and satisfactory, if pertinent, are all such truths as his propensity to falsehood has not enabled him to keep back.

Be the deponent who he may, the thread of his testimony should all along be divided, by the eye of the judge's mind,—carefully separated and divided, into two parts :—that which runs in the presumable direction of his wishes ; and that which runs in a direction counter to that of his wishes. In the former part, so far as depends upon bias, upon interest, may be seen a sort of evidence less trustworthy than if he were indifferent ; in the other, a sort of evidence more trustworthy.

The severer the impending evil, on the score of punishment, or on any other, the stronger, of course, will be a man's wishes to avoid saying

any thing that may help to subject him to it; and the more depraved the disposition of the man, the stronger his propensity, on every occasion, to pursue, in word as well as deed, the course indicated by the wishes of the moment, in spite of all suggestions of ultimate interest and moral obligation. Both these considerations laid together, hence it is, that, of one part of every malefactor's, of every liar's, evidence, (*viz.* the part which tells against himself), it may be said, and with unquestionable truth, the more determined the liar, the better the evidence. As to the ratio of the trustworthy part to the untrustworthy, it will depend upon the verity-insuring force of the scrutinizing operations to which it is subjected.

Falsehood a certain cause of deception and indecision? On the contrary, in how many cases is it a guide to truth, a security for rectitude of decision? In the very sort of case in which falsehood is most probable, deception, as a consequence of it, is least probable.

Falsehood, where wilful, forms a species, a most instructive and useful species, of evidence. It forms a particular modification of circumstantial evidence. Falsehood on any occasion is circumstantial evidence of criminality, of delinquency; of consciousness of misbehaviour, on either side of the cause, and in any shape.

When a person labouring under suspicion of a crime is in a course of examination, is it generally expected that all he says will be true? On the contrary,—the severer the punishment, and the stronger the persuasion of his guilt,—the stronger is the persuasion, that, so far as what he has to say to any point, will, if true,

tend to his conviction, (appearing to him, as it naturally will, to have that tendency), whatever it may happen to him to say as to that part will not be true.

Accordingly, it is from that sort of source which, with the fullest and most universal assurance, is looked to as a source of false evidence, that whatever assertion operates in favour of one side of the cause (*viz.*, to the prejudice of the interests and presumed wishes of him whose evidence it is) is regarded as the most satisfactory of all evidence: regarded, and by every body: the very lawyers not excepted, who, to guard themselves against deception, are so anxious to shut the door of judicature against any source of evidence to which it can by possibility happen to yield false evidence. But, forasmuch as the eyes of all mankind, judges themselves not excepted, are universally open to the falsity of false testimony, universally upon their guard against deception from the source that wears any appearance of yielding it; how can it be, that, on the part of judges, deception by reason of that same evidence, deception from whatever false evidence flows from that source, should be the certain, or so much as the preponderantly probable, consequence?

Not that, even in the cases where falsehood itself is looked to as the most instructive source of information; not that, even in the case of persons thus circumstanced, of persons from whom falsehood is expected in a larger proportion than from any others; not that, even from them, there seems reason to expect that falsehood should come in greater quantity than truth.

Truth, even in these cases, will be the general rule; falsehood, but an exception. Take what false proposition you will, there will be three conditions incident to the utterance of it:— 1. that it appear necessary to the accomplishment of the deponent's wishes, (*viz.*, for acquittal, if defendant, and so in other cases): 2. that it be not too palpably false to exclude a prospect of gaining credence: 3. that it be not of a sort to expose him to subsequent punishment too severe to be risked.

Symptoms of terror and confusion exhibited in deportment; non-responsion; indistinct and evasive responsion; all these indications have, on the same sort of occasion, and in the same character of circumstantial evidence, their use, their universally felt and acknowledged use: yet (such is the instruction derivable from falsehood) responsion, direct responsion, is on the same occasions still pressed for; as being (though replete with falsehood, or rather for that very reason) pregnant with a sort and degree of instruction and satisfaction, over and above any instruction and satisfaction that is to be derived from those other sources, any or all of them put together. From manifest improbability on the face of it, from self-contradiction, from counter-evidence, from any of these sources detection may flow: and then it is that (by operating as evidence of character, evidence much more conclusive than any extraneous testimony on that head,) the falsehood, as such, and recognized as such, affords its instruction, produces its effect in the character of circumstantial evidence.

The case here spoken of, is that of a person

labouring under the suspicion of criminality, and on that score stationed, by an act of the judge, in the situation of defendant: the suit having punishment for its object, real or professed. In this case, where any objection has been made to the propriety of receiving evidence drawn from such a source, from the lips or pen of an individual placed in that distressing situation, it has been rested, not on the ground of danger of deception, but on a very different ground, certainty of vexation on the part of the defendant, the proposed witness: of which in its place.

True it is, that it is only when either recognized, or at least suspected, to be what it is, that falsehood becomes thus instructive, becomes a fence against deception, instead of a source and cause of it. Equally true it is, that it is morally impossible that, in any of the cases in which the door ever has been shut or been proposed to be shut against evidence in consideration of the danger of deception, the falsity of it (whatsoever falsity it may happen to it to contain) should fail of having been suspected.

Thus it is, that exclusion can in no case, on any assignable ground, be put upon evidence, without wearing on the face of it a proof of its own injustice, a proof of the unsolidity of the ground.

Will it be said that, though the ground of the exclusion be just, it may happen to the judge not to be apprized of the justice of it? Admitting the case to be realized, the utmost that it would prove would be, that the appropriate arrangements should in every case be taken for making sure that the judge shall be

thus aware of it. What then, on the principle of this observation, is the proper course? Not exclusion to be put upon the evidence, but *instruction* to be given to the judge. But this is precisely the remedy which, as a succedaneum to be in all cases substituted to exclusion, it is the object of these pages to recommend.

The judge who, so much at his ease, pronounces a fact not true, because the witness by whom the existence of it has been testified may find himself a gainer in the event of its being credited, or on this or that particular occasion has been known to have swerved from the path of probity; would this same judge, with equal readiness, pronounce the same judgment, were a fact of the same description to call for his decision for any personal purpose of his own? Not he, indeed. Because a servant of his is believed by him to be addicted to lying, does he on that account lay down any such rule to himself, as never to put a question to that servant in relation to his own conduct, or to that of any other servant? Not he, indeed. If it be his misfortune to have a child whose character is tainted with that vice, does he lay down any such rule in his dealings towards this wayward child? Not he, indeed. The judge who, on the like hastily taken grounds, determines that the will of this or that testator shall be void, and that the augmentation or diminution intended to be made by it in regard to the share of this or that one of his children shall in consequence be without effect,—the same judge, if, with a view of making an augmentation or diminution to that same amount in regard to the share of one of his own children, he has to

make inquiry into facts,—does he pay so much as the slightest regard to any of these exclusive rules? Not he, indeed.

Why this difference? Because, in regard to the conclusion he forms in his individual capacity, he is sincerely desirous that it be just and true: whereas, in regard to the conclusion he forms in his official capacity, he cares not a straw whether it be true or untrue. In this case, all his concern is that it be found justifiable; conformable to the standard, whether in the way of statute law or jurisprudential law, to which, by his superiors and the public, his decisions are expected and required to be found conformable.

SECT. II.—*Probable source of this branch of the exclusionary system—Its inconsistencies.*

THE closer we look into the origin of this system of exclusion, the more thoroughly we may be convinced of its hollowness and injustice.

By whom have the exclusions been put? By the legislator, in the way of statute law? No; but by the judge, in the way of jurisprudential law.

If by the legislator, operating in the way of statute law; the ground for it, though still untenable, would not have been so completely hollow. To the legislator, in his situation, it might have been competent to say,—the judge, I fear, will not be sufficiently upon his guard against evidence thus circumstanced: the safe course will be to exclude it; and so, excluded it shall be: I will not trust him with it. Here,

as already shewn, this would have been short-sightedness, rashness, error; inconsistency, however, there would have been none.

But from the judge, nothing could have been more inconsistent, nothing, on any other supposition than that of improbity, more absurd. I will not trust myself with this evidence: it will deceive me: I am not upon my guard against it. Is such folly conceivable? Had it been prevalent, the practice of taking the examination of the defendant, on a capital or other criminal charge, never could have taken place. Yet, on the continent of Europe, in the seat of Rome-bred law, from whence the doctrine of exclusion was probably imported into England, such examination was and is not only customary but indispensable.

What then? Ought deafness, as well as blindness, to be among the attributes of Justice? Is the story of the Syrens not fable, but history? and is every man, every ruffian, that comes before you, a Syren? so that, wherever there is possibility of falsehood in evidence, there is no safety for you but in stopping up your ears? No, learned sir: no more than you, you who, if honest, can thus reason, are an *Œdipus* or an *Ulysses*. Such diffidence, beyond that of the most inexperienced virgin, is it credible, in the situation of him who never awakes in the morning but to see the fate of men lying at his feet?

Not qualified to judge of the veracity or correctness of a man speaking to a matter of fact? What is it then that you are qualified for? Is not this your occupation? Day by day, on one

occasion or other, is not this the occupation of every man that breathes?

But no; improbity, in some shape or other, presents to the difficulty a solution much more natural than is presented by the hypothesis of any such morbid diffidence. The origin of the exclusive system lies deep in the recesses of distant time: it dates in ages of barbarism; ages, in comparison of which the present, whatever may be the dream of vulgar prejudice, is the age of virtue.

Corruption as likely a cause as any; gross and determined partiality: whatsoever bond of connexion,—sympathy, common interest, or bribery,—may have been the cause. In judicature, corruption, in the worst cases, must have a pretence; and how many pretences have been acted upon, still more shallow and unplausible than this? Shallow as this is, the system of nullification stands not, in any part of it, upon any equally specious grounds.

Indolence, a cause at all times adequate to the effect: a cause still adequate to the production of it, even now that, on these higher seats, within the English pale at least, corruption even in its most refined shape may be pronounced rare, confined to cases of a particular sort; and in its grosser shapes probably without example.

This man, were I to hear him, would come out with a parcel of lies. It would be a plague to hear him: I have heard enough already: shut the door in his face.

As sheep follows sheep, judge, in the technical system, follows judge. Here, quoth

judge B, is a man, who, on such or such a score, lies under a temptation to speak false. In this or that shape, in the situation he is in, he has an interest in the cause. Exactly in this sort of situation was a man whom my brother A (though it is so long ago, I remember it as if it had been but yesterday) would not hear. Exactly in the same situation? In respect of exposure to temptation, perhaps?—Yes. But when brother A refused to hear the man, perhaps it was that he had already heard witnesses to the same fact till he was tired, and on the same side.

Suppose a riper age : history of judicial transactions brought to light in bits and scraps, at the command of booksellers, (no thanks to legislators or to lawyers). Of the cause of suspicion, a short indication ; but, as to the absence or presence of other evidence to the same or a different fact on the same side, a man might be a much better reporter than reporters commonly are (or at least used to be), without thinking of it.\*

The grounds of suspicion in evidence may be ranked under four cases.

\* It seems much more probable, that the exclusion of evidence originated in the ignorance of an uncivilized age, than in the sinister interest of the judge. In a rude state of society, where the art of extracting truth from the lips of a witness is not understood, and where testimonies are counted, not weighed, it seems to have been the universal practice to strike out of the account the testimony of all witnesses who were considered to be under the influence of any mendacity-promoting cause. Exclusionary rules of evidence have nowhere been carried so far as under the systems of procedure which have been the least fettered with technicalities. Take, for instance, the Hindoo law of evidence. See *Mill's History of British India*, book II. chap. iv.—*Editor*.

1. The fact spoken to, not the fact itself which is in question, but a fact supposed to be connected with it; so connected with it, that the existence of the evidentiary fact affords a reason for inferring the existence of the fact thus evidenced to. This is circumstantial evidence, considered as contradistinguished from direct.

2. The information in question not delivered immediately from the source of the information (the person, the thing, or the script, from which it is derived). This is transmitted evidence, considered as contradistinguished from immediate: hearsay evidence, transcriptitious evidence, in their infinitely diversifiable degrees of remoteness from the source.

3. The evidence in question not collected or delivered in the best mode; not delivered under the influence of those securities for trustworthiness, which are commonly, and might be generally, employed for securing the correctness and completeness of the mass of information:—sanction of an oath, examination, cross-examination, fixation by writing, and so forth. In this rank are, in their own nature, and without the default of any person, all casually-written documents, such as letters and memorandums: and, by the default of the legislator or the judge, all evidence collected in any mode inferior in efficiency, from a source from which evidence might, without preponderant collateral inconvenience in the shape of expense, vexation, and delay, be collected in the best shape. Examples:—affidavit evidence; nakedly assertive discourse (as in unsworn pleadings); and evidence collected *per judicem solum, sine partibus*.

4. The person who is the source of the information, exposed to some assignable cause of suspicion, affecting the trustworthiness of his statements.

Here, then, are four causes of weakness in the evidence, of which the one here in question is but one. In the other three cases, either no exclusion at all is put upon the evidence, (as in the case of circumstantial evidence in general); or an exclusion is put in some instances, not put in others, according to a system of infinitely diversified and inconsistent rules, (as in the case of the different modifications of unoriginal and casually-written evidence above mentioned); or the weakness of the evidence in the state in which it is delivered, or offered to be delivered, is the act and deed of the exclusionist himself: he himself bespeaking it in a weak and bad shape, refusing to receive it in a better shape,—even when, in the best possible shape, it would be received with less collateral inconvenience, as above.

This same psychological epicure, the delicacy of whose palate refuses all aliment that, in its unconcocted state, presents a suspicion of any the slightest taint, will not suffer it to be served up to any table of his own, for his own use, unless, by cooks from his own kitchen, it has been brought, by a process of *mortification*, into sort of carrion state.

A degree of ridicule attaches itself to the labour of him who perseveres in combating with the arm of reason a practice in the production of which improbity and imbecility took undistinguishable parts, and in which, as soon almost as the idea is started, any one, whose eyes are

not determinedly closed, may see that reason had never any share.

Witnesses, each of them with a mark of suspicion stamped upon his forehead, present themselves to the English exclusionists for admittance. Blindfolded by a bandage borrowed certainly not from justice, but from knavery or prejudice, some of them he rejects, in consideration, as he says, of the mark ; and in regard to those, the objection, in the jargon of English jurisprudence, goes to the *competency* : others of them he admits, notwithstanding the mark ; and as to these, the objection goes only to the *credit* : in plain English, amounts to nothing, produces no effect at all.

The whole assemblage of suspicious characters being thus distinguished into two groups, whose lot is so different, the elect and the reprobate ; a requisition that would be to be made, (if reason had any share in the concern), is, that some sign should be shewn, by which it might be made to appear that, in the least reprobate of the reprobate, the force of the cause of suspicion is greater than in any of the elect : or, if this be too much to require, that, at the least, in an average man of the reprobate, the force of that same cause was greater than in an average man of the elect.

Such criterion, then, is it any where to be found ? So far from it, that, on the contrary, instances will be found, instances to an indefinite extent, in which, where the force of the cause of suspicion is at its maximum, or but a hair's breadth below it, the proposed witness, is admitted notwithstanding,—admitted into the class of competent witnesses : where

that same force is at its minimum, a quantity purely ideal, utterly incapable of ever having any the smallest effect in practice, the witness is shut out.\*

The shape in which it may happen to testimony to be collected, has just been mentioned as one among the sources of the weakness to which evidence is subject. On this ground an argument may be built by the exclusionists : let us hear it.

In Rome-bred procedure, the means of detecting or preventing mendacity are so perfectly insignificant, that it would be dangerous in the highest degree to admit evidence from any but the purest and most unsuspected source. Parties not admitted : no questions asked but in a whispering room, as between confessor and penitent, by the judge : no counter-interrogation, (for the cross-examination of Rome-bred law is an abuse of words, the penner of the counter-interrogations knowing nothing of the answers to the interrogations) : no counter-evidence, for we keep the evidence as close as possible, lest there should be. Not a creature to hear the evidence, but one who cares not a straw whether it be true or false. Thus circumstanced, the evidence is true or untrue, pure or impure, according to the source from which it flows. Under such a system, ought any thing under the degree of angelic purity ever to be heard ?

Answer : No, most certainly. Accordingly, until the time comes when angels can be subpoena'd, under such a system there is but one

\* See the following chapters.

proper course, which is, to exclude every body. That done, if you think it better to receive evidence than to decide without evidence, you will admit the evidence in a shape in which it is fit to be received.

The argument, such as it is, serves, in the manner we have seen, to justify the application of the exclusionary system to the cases in which the evidence is collected in the Roman mode. It will operate still more strongly in favour of the application of it to evidence received in the English affidavit mode.

Be this as it may; certain it is, that, under the Rome-bred system (upon the continent, understand), the exclusionary system has been carried to still greater lengths than under the English; and accordingly, under the former, compared with the latter, if the mischief be greater, the inconsistency is less.

The rules of evidence are the same in equity as in law. So it has been said, and always without exception, any number of times over, by chancellor after chancellor. It is not true; but, so far as it is true, in point of consistency at least, so much the worse. The worse the mode of collection, the more select ought to be the evidence. There ought to be gradations upon gradations; valves behind valves. One exclusionary system, for evidence in causes tried by or before a jury; another, for causes tried in equity; another, for causes tried by learned common law judges, upon affidavit evidence. Single-refined might do for the jury-box; none but double-refined ought ever to be received into an examiner's office; none but treble-refined ever handed up to the bench.

Thus stands it in point of consistency: how in point of fact? In the shape of affidavit evidence, every thing is good, from every body: from plaintiffs, from defendants, from felons, from perjurers. Present your evidence to a learned judge, he cares not where it comes from, so it come in a bad shape; in a shape in which it is filable and filed; *anglicè*, in a shape in which fees are paid upon it.

## CHAPTER III.

IMPROPRIETY OF EXCLUSION ON THE GROUND  
OF INTEREST.

SECT. I. — *Interest in general, not a proper ground of exclusion.* <sup>a)</sup>

SEEING that deception is so far from being a certain, so far from being even a preponderantly probable, consequence of falsity in evidence, even when the existence of the falsity is certain; it seems almost a superfluous task to shew, that to regard any of those circumstances which have been held as grounds of exclusion, as being, in any state of things whatever, to a certainty productive of falsehood in the evidence, is a presumption altogether unwarrantable.

The impropriety of it will appear in a clearer and stronger light, when we come to view, one by one, the several alleged causes of exclusion, for security against deception; the several circumstances, of which, falsity in the evidence has been regarded as the necessary, or at least preponderantly probable, result.

To begin with the article of *interest*. I say here, not sinister interest, but *interest* without addition: for such is the expression employed in the books of English jurisprudence.

*a) See note division of this rule in Hall v. 15.  
2 P. 57.*

On this occasion, as on every other, to understand what *interest* means, we must look to motives : to understand what motive means, we must look to pain and pleasure, to fear and hope : fear, the expectation of pain or loss of pleasure ; hope, the expectation of pleasure or exemption from pain. The causes of physical motion and rest are attraction, impulse, and so forth : the causes of psychological motion and rest are motives. Action, or (in opposition to action) rest,—action, whether positive or negative,—action, without motive, without interest, is an effect without a cause.

It is not out of every sort of pleasure, out of every sort of pain, that a motive, an interest, is (at least in a sense applicable to the present purpose) capable of arising. Some pleasures, some pains, are of too ethereal and perishable a nature to excite an interest, to operate in the character of a motive.

The pleasures and pains which present themselves as capable of acting in that character, have, in another work,\* been reduced to a certain number of heads.

In the estimation of vulgar prejudice, there is a natural alliance between improbity and intelligence, between probity and imbecility. In the estimate of discernment, they are differently grouped : improbity and hebetude ; probity and intelligence.

Ignoramus has, for the purpose of this topic, composed his system of psychology. What is it? A counterpart to the learned Plowden's system of mineralogical chemistry : equal as

\* Springs of Action Table.

touching its simplicity; equal as touching its truth. Two parent metals, sulphur and mercury: the mother, sulphur; the father, mercury. Are they in good health? they beget the noble metals: are they in bad health? they beget the base. *Fortes creantur fortibus et bonis.*

With minds of every class the mind of the lawyer has to deal. Of the structure of the human mind what does the lawyer know? Exactly what the grub knows of the bud it preys upon. By tradition, by a blind and rickety kind of experience, by something resembling instinct, he knows by what sophisms the minds of jurymen are poisoned; by what jargon their understandings are bewildered; how, by a name of reproach, the man who asks for the execution of the laws and the formation of good ones is painted as an enemy,—the judge who by quibbles paralyzes the laws which exist, and strains every nerve to prevent their improvement, is pointed out as an idol to be stuffed with adoration and with offerings.

In the view taken of the subject by the man of law; to judge of trustworthiness, or, at least, of fitness to be heard, *interest* or *no interest* is (flagrant and stigmatized improbity apart) the only question. Men at large are not under the action of any thing that can with propriety be expressed by the name of interest; therefore they are to be admitted. Is a man exposed to the action of any thing that can be designated by that invidious name? So sure as he is, so sure will his testimony be false. Enough: all scrutiny is unnecessary: shut the door in his face.

*Sinister interest* — the term and the distinction are alike unknown to them. Sinister interest? Every thing that can be called interest is in their eyes sinister.

*Sinister interest*, a term so well known to moralists and politicians, is altogether unknown to lawyers, who have at least equal need of it.

What, then? Is it that there are certain sorts of interests that are always sinister interests, while there are other sorts which, if language, like heraldry, were made by analogy instead of by accident, would be called dexter interests? No, truly. No sort of interest that is not capable of being a sinister interest; no sort of interest that is not capable of being a dexter interest. Acting in a direction to draw a man's conduct aside from the path of probity, any sort of interest may be a sinister interest: acting in a direction to confine a man's conduct within the path of probity, every sort of interest is a dexter interest. The modification of probity here in question is veracity. Any interest acting in a direction to draw his conduct aside from the line of veracity, is a sinister interest, — say, in this case, a mendacity-prompting or instigating interest: every interest acting in a direction to confine his discourse, his conduct, his deportment, within the path of truth, of verity, of veracity, is a dexter interest; say, in this case, a veracity-securing interest.

Man in general not interested, devoid of interest? His testimony not exposed to the action of interest? Say rather (for so you must say if you would say true), *no* man, no man's testimony, that is not exposed to the action of interest.

Well: and that interest a sinister one? Not it, indeed. So far from it, there is no man whose testimony is not exposed to the action of, is not acted upon by, at least *three* regular and standing, commonly *four*, forces of this kind; all tending to confine his conduct within the path of probity, his discourse and deportment within the path of veracity and truth.

1. Motive belonging to the physical sanction. Aversion to labour: love of ease: trouble of inventing and uttering a false statement, which, to answer its purpose, must be so elaborated and dished up as to pass for true.

2. Motive belonging to the political sanction. Fear of legal punishment; viz. if it be a case in which (as in general) punishment stands annexed by the legislator or the judge to false and mendacious testimony.

3. Motive belonging to the moral, or say popular, sanction. Fear of shame, in case of detection or unremoved suspicion.

4. Motive belonging to the religious sanction. Fear of supernatural punishment, in this world or in the world to come.

Of these four motives, the three first have more or less influence on every human mind; the last, probably, on most minds.

On most minds, did I say? On all without exception, if the English lawyer is to be believed: for, by a contrivance of his own, he has shut the door against all witnesses on whose hearts motives of this class fail of exerting their due influence.\*

In the above list we may see the regular

\* Vide *infra*, chap. 5.

forces which are upon duty on all occasions to guard the heart and the tongue against the seductions to mendacity. But, in addition to these, there may be, by accident, any number of others, acting as auxiliaries in their support. No sort of motive (even these tutelary ones not excepted) to which it may not happen to act in the direction of a seductive one; no motive, over and above these tutelary ones, to which it may not happen to act also in the direction of a tutelary one. For what motive is there to which it has not happened, does not continually happen, to be employed in stimulating men to actions of all sorts, good and bad, in the way of reward; in restraining them from actions of all sorts, in the way of punishment?\*

Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one. But if a choice were unavoidable, the absurdity would be less gross to say, No man who is exposed to the action of interest will speak false,—than to say, No man who is exposed to the action of interest will speak true. Of a man's, of every man's, being subjected to the action of divers mendacity-restraining motives, you may be always sure: of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure.

But suppose you were sure. Does it follow, because there is a motive of some sort prompt-

\* See Book I. THEORETIC GROUNDS. Chap. 11. *Moral correctness and completeness in testimony.*

ing a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed : but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty : but will he obey the impulse? That will depend upon the forces tending to confine him to that path : upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth : yet all bodies are not there. All mountains have a tendency to fall into a level with the plains : yet, notwithstanding, there are mountains. All waters seek a level : yet, notwithstanding, there are waves.

In a machine, motion or rest will depend upon the proportion between the sum of the impelling and the sum of the restraining forces : in the human mind the result will be the same. Every thing depends upon proportions ; and of any proportions in the case, the man of law takes no more thought than the machine does.

Upon the proportion between the impelling and the restraining forces it depends, whether the waggon moves or no, and at what rate it moves : upon the proportion between the mendacity-promoting and the mendacity-restraining forces it depends, whether any mendacity be produced or no, and in what degree and quantity. Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would it be to say, any horse, or

dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a running at the pace of a mail coach.

In the human mind there is a force to which there is nothing exactly correspondent in the machine; the force of *sensibility*: of sensibility with reference to the action of the various sorts of pains and pleasures, and their respective sources, in the character of motives.

Take what every body understands, money: for precision's sake, take at once 10*l.*; the 10*l.* of the day, whatever be the ratio of it to the 10*l.* of yesterday: to the present purpose, depreciation will not affect it. This 10*l.*, will its action be the same in the bosom of Cræsus as of Irus? in the bosom of Diogenes, as in that of Catiline? No man will fancy any such thing for a moment: no man, unless, peradventure, it have happened to him to have been stultified by legal science.

In each individual instance, whether mendacity (temptation presenting itself) shall be produced or no, will depend upon four distinguishable quantities: quantities above indicated. On the one side, 1. sum of the mendacity-promoting motives; 2. the patient's sensibility to ditto. On the other side, 3. sum of the mendacity-restraining motives, regularly acting and occasional; 4. patient's sensibility to ditto. Upon these several quantities: consequently upon the ratio or proportion of the sum of the quantities on the one side to that of the quantities on the other. Of the proportion, the exclusionist knows not any thing; he knows not any of the quantities; he will not suffer him-

self to know any thing : he regards mendacity as certain : he excludes the evidence.

Of none of these several quantities can any thing be known or conjectured, without examination and sifting of the evidence. Nothing can be known without experiment : and he will not suffer experiment to be made.

It is in psychology as in ship-building and navigation. Suppose the ship's way to depend upon the joint action of six influencing circumstances ; six jointly acting, but mutually conflicting, causes : and these, each of them, say (for supposition's sake) of equal force. If, in the investigations and reasonings on this subject, so much as one of the six be omitted, error is the inevitable consequence : the forms of mathematical language, instead of a check to the error, will operate but as a cloak to it. The vessel will be in one part of the world, while the Lagranges and the Eulers are proving it to be in another.

In this respect, what course of ratiocination has been pursued by lawyers, debating on the ground of established systems ? Of the whole catalogue of motives, each capable of acting upon the will with the most efficient, all consequently with a practically equal, force, they have taken observation of perhaps one, perhaps two ; while on each side, or (what is worse) on one side only, the will of the patient has been acted upon by perhaps twice or thrice the number. What, in consequence, has been the justness of the conclusion ? Much about what it would be in navigation, if calculations made for a submarine vessel, or an air-balloon, were to be

applied to a ship of ordinary make and size : or as if, in calculating the course of an ordinary vessel, no account were taken of the depth of water drawn by her, or of the position of her sails.

In this state of the progress made by lawyers in the theory of psychology, no wonder if we should find the theory and practice on the subject of evidence in no better plight than navigation was among the most polished nations of Europe, when the scene of it was confined to the Mediterranean, and when, dreading to lose sight of land, the navigator crept along the shore.

Between these two otherwise resembling cases, there is, however, one very material and lamentable difference. In navigation, ignorance, deficient in adequate power, erred by over-caution and timidity : in jurisprudence, ignorance, supersaturated with power, is driven aground continually by hastiness and rashness.

It would be tedious, and surely by this time superfluous, to pursue absurdity on this ground through all its mazes.

No presumption so slender, which is not, under some established system, taken for conclusive : if fact, notorious or provable fact, run counter, it makes no difference. Mendacity is presumed from affection ; from bare wishes : wishes themselves are presumed from situations, from relations. Brother will be for brother, master for servant, servant for master, and so on. What ? when you see them fighting with one another every day ? Is it for his excessive fondness for Abel, that Cain would have been excluded by you ? No matter : it makes no difference.

Among the causes of exclusion in Scotch jurisprudence, imported or not from the Continent,

is this : if a man applies to either party, tendering his testimony.\*

Observe, first the absurdity of this exclusion, and then the mischievousness of it.

Absurdity. What? On the north side of the Tweed, does no such affection exist in any human bosom as the love of justice? In a legal bosom, it seems, no; any more than on the south side. To the man born blind, all colours are alike unknown : but was ever blind man found absurd enough to deny, or thoughtless enough to forget, the existence of colours?

Mischievousness. Mischief the 1st. A man saw you robbed, beaten, left for dead : him, you, for your part, did not see : you were too much engaged. To him, you, on your part, cannot apply to testify what he saw ; for you know not that he saw any thing : to yourself, he, on his part, must not. Did you proffer that testimony of yours to the plaintiff? asks the advocate on the other side. Yes, I did. Oh! then, away with you ; tell it any where else you will, you must not tell it here : so sure as you opened your mouth, so sure you would be perjured.

Mischief the 2d. Directions to worthless witnesses : to all who, in the school of technical jurisprudence, have learnt to hate justice : to all who are in fact (if any such there be) as worthless as the man of law supposes every man to be. If you see any man barbarously injured, and, to earn a bribe, or save the trouble of testifying, you desire he should be without remedy, go and offer him your service. If you see a man purloining public money,

\* Erskine. Macdowal, vol. ii.

making laws for honour, breaking them for profit, don't stand upon rules of evidence established for the plain purpose of giving impunity to malefactors ; don't slink under a plea that will ruin you with every man who has any regard for justice ; go to the prosecutor at once, and force upon him your evidence : the more obtrusive your address, the surer you may make yourself of destroying the competency, and, if that won't do, the credibility, of your evidence.

To this rule, such is its absurdity, it can hardly have happened to be frequently acted upon : but, like every other absurd and mischievous rule of which the system is composed, it lies in readiness, well adapted to serve a cause too desperate to be served by less vile means ; perfectly adapted to afford to long-robed iniquity the necessary pretence.

In this example, we may see a specimen of the sort of evidence on the ground of which the technical lawyer builds a pretence for the exclusion of other evidence. In partial affection, say rather in preferable regard, he sees evidence, and that conclusive evidence, of perjury ; as if to wish well to your friend, and to perjure yourself for him, were inseparable. In the mere act of saying, I saw so and so, and am ready to testify what I saw, they see evidence of partial affection, *Scotico-jargonicè* partial counsel : as if it were impossible without injustice to wish to declare to justice what he saw.

Compare Scotch and English judicial science. In Scotland, for informing the conscience of learned judges, no spontaneous witnesses receivable. In England, for informing consciences of the same learned texture, no witnesses receivable

but willing ones.\* Such is the metamorphosis undergone by learned Justice in her passage from one side to the other of the Tweed. Between *willing* and *spontaneous* there is certainly some difference: the expression has carefully preserved it. Let jurisprudence make the most of it: there is not an atom to be lost.

Observe, on this ground as on so many others, the consistency of the men of law, and especially English law. Delinquency, according to them, is not ever to be presumed. Yet, as often as, on the ground of danger of deception through falsehood, they exclude evidence, what is it they do but presume delinquency? What is it, as often as on this ground they exclude testimony that would otherwise be received by them in the character of evidence,—what is it they do but to presume perjury? Actual perjury, no; because their providence has prevented it: actual perjury, no more than actual murder, when, the pistol or gun having been fired, a tutelary hand has just had time to beat down the guilty hand in the act of pulling the trigger: actual perjury not committed, but the state of the mind exactly as if it had.

Perjury presumed, not indeed for the punishing of the presumed perjurer, but for the inflicting punishment, or (if that be not the word) vexation, on an innocent and injured man: vexation to an unlimited extent.

\* For their own use, English judges, learned ones at least, (as has been so often mentioned) receive no testimony but in the affidavit shape. But no man can be compelled to give his testimony in this shape. The appropriate summons, the *subpœnâ ad testificandum*, applies not to this shape.

Suppose the excluded testimony necessary to save the life of a man capitally prosecuted, as for murder : here, one man being presumed an intended perjurer, another man suffers death.\*

SECT. 11. — *Peculiar impropriety of exclusion on the ground of pecuniary interest ; and absurdities of English law under this head.*

Is, on the ground of interest generally considered,—if, on the ground of any other species of interest in particular,—the unreasonableness of exclusion is demonstrable ; it is in the instance of pecuniary interest that it is most palpable. In the case of any other species of interest ; the interest not having any palpable physical cause, the quantity of which might serve as an index and measure of its force ; the strength of it where it is strong, the weakness of it where it is weak, is not so universally manifest and incontestable. Suppose, for example, it be contended that enmity, known

\* A man who had an estate *pur autre vie*, the *auter vie* being the life of one on trial for a capital crime, would his testimony, in English law, be admitted at the instance of the prisoner ? I leave the question, a maiden one, for the choice of future contingent quibblers. But this I know, that if I were a judge, and it were a way with me upon the bench to do a kindness to a friend's friend, the man should be hanged or not, as I pleased. Hang or not hang, I should be sure, not only of my job, but of my praise. Loading the gallows, I should have praise for my justice ; exonerating it, for my humanity : the job should determine which.

But be this as it may, in the case of interest, pecuniary interest ; in the case of improbity, as evidenced by felony and connection thereof, there could be no doubt.

enmity, is a reasonable ground of exclusion. Enmity, like any other passion, is variable *ad infinitum* in degree: capable of existing in any the lowest degree, as well as in the highest. But the force of enmity, as of almost every other passion except the love of money, can no otherwise be measured than by its effects: so that if in this or that instance no visible effects have followed from it, the only proof of which the existence and action of it is susceptible is wanting to the case. In the instance of pecuniary interest, the argument stands upon a very different footing. Without reckoning the variations in degree, resulting from the variations in the degree of opulence of which the pecuniary circumstances of the party are susceptible; the degrees of which the force of pecuniary interest is susceptible are not only prodigiously numerous, but also, in the lowest degrees, susceptible of an existence as palpable and ponderable as in the highest. As a thousand pounds, applied in the shape of reward, will be recognized as acting on the mind in the character of a lot of pecuniary interest, with a force proportioned to its amount; so in like manner will a shilling, a penny, or a farthing. The legislator, and the administrator, the great dealers in this species of ware, can as well cut out in pennyworths' and farthing's worths the portion of pecuniary interest which they may be minded to create, as in hundred pounds' worths and thousand pounds' worths; and how questionable soever, or even hopeless, the influence of this species of interest may be, when broken down into

these minute and almost impalpable lots, yet the existence of it in this case is not less manifest and indisputable than in the other.

Thus it is that, in the instance of pecuniary interest, the impropriety of the exclusion is exposed to view by a circumstance which has no place in any other. Generally speaking, no other species of interest appears so much as to exist, but in cases in which it acts, not with considerable force only, but with effect. It is not seen to exist, but where it is seen to act; nor is seen to act, but where it is seen to triumph. Far otherwise is it with pecuniary interest. The portions in which it is seen to exist are in many instances so minute, that in those instances the notion of its prevalence is too palpably absurd to be embraced, or so much as pretended to be embraced, by any body. Who, for instance, speaking of the people of England, would take upon himself to maintain, with a grave face, that the majority of them would be ready, upon all occasions, each of them to perjure himself for the value of a farthing? Propositions, however, far beyond this in extravagance, have been implicitly assumed by many a decision that, on this ground, has issued from English benches. An interest, corresponding to some minute fraction of a farthing, has in many instances been assumed as a legitimate cause for the exclusion of a witness, on the sole ground of the pecuniary interest generated by that cause.

In vain would it be to say, that this is among the cases in which we cannot draw the line; and that, therefore, in order to shut out the evidence in the cases in which the sinister

influence exerted on it by this species of interest would be operative, and productive of the apprehended ill effect, we must be content to shut it out in many instances in which, manifestly enough, it cannot be operative. The very impossibility of drawing a line, a proper line, any where, is an argument, and that of itself a conclusive one, against the exclusionary principle. A line of this sort (it must be confessed) would, in whatsoever place drawn, be an improper one. But, by the principle of exclusion, a line of this sort is not only drawn, but drawn at the very worst place possible. There is an impropriety in drawing the line, for example, at the sum of forty shillings; and in laying down any such proposition as that which is implicitly contained in the Court of Conscience Acts, that a man is not to be trusted to give his evidence in a case where he has a sum of money to that amount at stake upon the result of it. There is an impropriety. Why? In the first place, because (setting aside all such inscrutable circumstances as those which consist of psychological idiosyncrasies, affecting the sensibility of the individual in question to the respective action of the improbity-and-mendacity-restraining motives), there are some incomes to which four hundred pounds are not more than forty shillings to others. In the next place, because, even supposing it clear, in the instance of any particular individual, antecedently to experience, that forty shillings would constitute a temptation sufficiently strong to engage him in the path of perjury,—supposing it possible, I say, to find sufficient reason for predicating this of a sum

of forty shillings, — it would not be possible to find sufficient reason for refusing to predicate it of a sum of thirty-nine shillings. But, by the line of exclusion drawn where it is drawn, this effect is predicated, not only of a sum of forty shillings or of a sum of thirty-nine shillings, but of a sum less, and much less, than the thirty-ninth or fortieth part of the smallest piece of base metal that ever came out of a mint: and this by a sweeping and unbending rule, by which people of all degrees of opulence as well as indigence, the Cræsus as well as the Iruses, the Dives as well as the Lazaruses, are excluded in the lump.

The force with which a motive of a pecuniary kind acts upon the mind of a given individual, will be in the ratio of the sum in question to his pecuniary circumstances. In England, two individuals may be found, one of them belonging to the most numerous class, the income of one of whom is to that of the other as 500 to 1. All other circumstances set aside, the force with which a given sum acts upon the mind of one of these individuals, will be but one five hundredth part of the force with which it acts upon the mind of the other. Yet (supposing this rule to be observed) if, on account of his being acted upon by the prospect of gaining in this way a given sum, the testimony of the poorer of the two individuals in question is to be rejected, so must that of the richer. The same effect, and that a certain one, is to be ascribed for this purpose to two forces, of which the one is in truth but the five hundredth part of the other.

In Great Britain, an estate of the value of

20,000 guineas a year, or thereabouts, has been known to be at stake upon the event of a single cause: value, at thirty years' purchase, 600,000 guineas. A guinea contains a little more than 1000 farthings: this same sum, then, applied to persons whose incomes stand at different points in the scale, from the highest to the lowest, is capable of acting on them respectively with 1000 different degrees of force: 600,000 being the number of guineas, multiplying the 600,000 by the 1000, here then are 600,000,000 different degrees of force with which the mind of man is capable of being acted upon by this one motive called pecuniary interest, to which by this rule one and the same degree of force (and that in every case an irresistible one) is ascribed.

Thus different are the degrees of force with which this one, among so many causes of falsehood, (checked by the action of so many counter causes, of so many causes of truth), tends to the production of its effect: degrees, which, by the identity of the denomination given to them, viz. *pecuniary interest*, are represented as being the same. From the mere consideration of this diversity, it must be sufficiently evident, that, in a vast number of the instances in which this cause of falsehood has place, its influence must, practically speaking, be equal to 0; not capable of surmounting the mere *vis inertiae* of the human mind, supposing this cause of action to stand alone, unopposed by any other: whereas the whole force of the standing causes of truth is what it has to encounter in every instance, without reckoning the force of such of the causes of truth, the action of which is but

occasional. Yet this is the cause, and indeed stands at the head of the list of the causes, the force of which is, by the rule which assumes it for a ground of peremptory exclusion, regarded as being in every instance infinite and irresistible : certain, at least, of preponderating over the sum of all other forces—of all causes of truth—to which it can happen to stand opposed to it.

If there were any sort of witnesses imaginable against whom it were prudence to shut the door, the sort of witnesses against which the law is so decided to shut the door are precisely those to whom it may be thrown open with least danger. All witnesses being exposed to seductive influence, all witnesses being dangerous, those will be least dangerous against whom men are most upon their guard : such are those on whose foreheads the force of the seduction is written down in figures. A cloud involves the workings of friendship, a cloud involves the workings of enmity, a cloud involves the workings of love : the existence of the passion, the force of its action, every thing is involved in darkness. No juryman, no stranger, scarcely even the closest intimate, can form any estimate of the degree of the enmity, the friendship, or the love : experience may have shewn him no such enmity, no such friendship, no such love. But every man knows what ten shillings is, what twenty shillings is, and what is the difference : every man knows the value, every man feels the power, of money. Every man knows that allowances are to be made for it. Few men are disposed to make less allowance than truth requires, for the force of its

action on other people. Few men are disposed to set the incorruptibility of other men at too high a rate, or the force of corruption at too low a one : few men in whom suspicions thus grounded are in any danger of not being carried up to the full limits of the truth ; few in whom they are not much more apt to be carried beyond the truth than to fall short of it.

Of the force of money, on whatever occasion acting, the judge sitting on his bench is fully aware and acutely sensible. Agreed : but is there any other human being to whom that force is a secret ? Sits there that old woman any where (not to confine ourselves to benches) who, on hearing a report made to her by another old woman, forgets to ask herself in what way and degree (if in any) the reporting old woman may have to gain or lose by the credit given or not given to her report ?

What ? can the man of law be sincere in thinking that no sort of men understand either the value of money, or the influence of it upon testimony, but himself ?

In this case, therefore, the advantage expected from exclusion of evidence, in the character of a security against deception and consequent misdecision, is more plainly ideal than in any other : the reason in favour of the exclusion more palpably frivolous. And yet it is to this modification of interest, that exclusion on the score of interest is in a manner confined by English jurisprudence.

In the eyes of the English lawyer, one thing, and one thing only, has a value : that thing is money.

On the will of man, if you believe the Eng-

ish lawyer, one thing, and one thing only, has influence : that thing is money. Such is his system of psychological dynamics.

If you will believe the man of law, there is no such thing as the fear of God ; no such thing as regard for reputation ; no such thing as fear of legal punishment ; no such thing as ambition ; no such thing as the love of power ; no such thing as filial, no such thing as parental, affection ; no such thing as party attachment ; no such thing as party enmity ; no such thing as public spirit, patriotism, or general benevolence ; no such thing as compassion ; no such thing as gratitude ; no such thing as revenge. Or (what comes to the same thing),—weighed against the interest produced by the value of a farthing, the utmost mass of interest producible from the action of all those affections put together vanishes in the scale.

Add self-preservation, if you please ; self-preservation from whatever be the worst of evils, death not excepted : the farthing will still be heaviest. “ A pin a day is a groat a year.” Instead of the farthing, put in a pin, the result will be still the same.\*

\* Under jurisprudential law, in cases in which a penalty is given to the poor of the parish, and thence in exoneration of the rateable inhabitants, the evidence of a parishioner could not be heard to convict a man of an offence subjecting him to a penalty of five shillings thus applicable. Instead of five shillings, say one shilling : examples might be found :—poor's share, sixpence. Take a parishioner of Marybone, and compute how much more or less than that of a pin the value of his share of the one shilling or the five shillings would be.

Comes a statute to remedy this : and, under the auspices of learned gentlemen, instead of confining the remedy, as might

Romance, romance! True; but it is the romance of real life. The picture here drawn of the human mind is romantic enough, no doubt; but as to the account here given of that picture, nothing was ever more strictly true. Such are the decisions of the sage of law; such his every day's practice; such his opinions, such his thoughts: unless, on learned benches, decision and practice run on without thought.

For a farthing, for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science: this in Westminster Hall is law. According to the prints of the day, 180,000*l.* was the value of the property left by the late Duke of Bridgewater. For a fraction of a farthing, Aristides, with the duke's property in his pocket, would have perjured himself.

One decision I meet with, that would be amusing enough, if to a lover of mankind there could be any thing amusing in injustice. A man is turned out of court for a liar,—not for any interest that he has, but for one which he supposed himself to have, the case being otherwise. Instead of turning the man out of court, might not the judge have contented himself with setting him right? Would not the judge's opinion have done as well as a *release*?\* The pleasant part of the story is, that the fact on

have been, to the individual parish in which in the individual case the evidence had been lost, actually extends it to all the parishes in all England. O heroic probity! O portentous reach of thought! Thus is jurisprudence mended! thus statute books filled!

\* Vide *infra*, chap. vii. *Restoratives to competency.*

which the exclusion was grounded could not have been true. For, before the witness could be turned out of court for supposing himself to have an interest, he must have been informed of his having none; consequently, at the time when he was turned out, he must have ceased to suppose that he had any.

Another offence for which I find a man pronounced a liar, seems to make no bad match with the foregoing: it was for being a man of honour. "Oh ho! you are a man of honour, are you? Out with you, then; you have no business here." Being asked whether he did not look upon himself as bound in honour to pay costs for the party who called him, supposing him to lose the cause, and whether such was not his intention; his answer was in the affirmative, and he was rejected. It was taken for granted that he would be a liar. Why? Because he had shewn he would not be one. If instead of saying yes he had said no, who could have refused to believe him? and what would have become of the pretence?

By the supposition, the witness is a man of super-ordinary probity: moral obligation, naked moral obligation, has on him the force of law. What is the conclusion of the exclusionist? That this man of uncommonly nice honour will be sure to perjure himself, to save himself from incurring a loss which he cannot be compelled to take upon himself.\*

\* Both these extravagancies have been set aside by later decisions. A witness cannot now, according to Philipps, be excluded on account of his believing himself to be interested,

To observe, in an instructive point of view, the cases where the exclusionist runs a tilt, as

nor on account of his considering himself bound in honour to pay the costs. See Phillipps, i. 50, 51. The former point, however, seems to be still doubtful. See Phillipps, note (1) to p. 52.

Another of the absurdities of English law, in respect to the exclusion grounded on pecuniary interest, is very well exposed in the following passage, extracted from a review of the *Traité des Preuves Judiciaires*, in the 79th Number of the Edinburgh Review :—

“ Take as an example the case of forgery. Unless the crime has been committed in the presence of witnesses, it can only be *proved* (in the proper sense of the word) by the individual whose name is said to have been forged. Yet that person is the only one whom the law of England prohibits from proving the fact; a strange prohibition, for which some very strong reason will naturally be sought. The reason to be found in *the books* is this, that the party has an interest in pronouncing that paper forged, for the enforcement of which he may be sued if it is genuine: and this would be true, if the event of the criminal inquiry were admitted to affect his interest, when the holder proceeds in a civil suit to enforce the supposed obligation. But it is also an indisputable rule, that the issue of the trial for forgery, whether condemnation or discharge, is not permitted to have the least effect upon this liability: the criminal may be convicted, and yet the party whose name appears to the instrument, may be fixed with the debt in a civil proceeding; or he may be acquitted, and yet the genuineness of the handwriting may hereafter be questioned, and its falsehood established. How, then, can the anomaly of this exclusion be explained? It seems that legal antiquarians have preserved the tradition of a practice which is said to have prevailed in former times,—when a person was convicted of forgery, the forged instrument was *dannet*; i. e. delivered up to be destroyed in open court. The practice, if it ever existed, now lives but in the memory of the learned; the disabling consequences, however, survive it to this hour. The trial proceeds in the presence of the person whose name is said to have been forged, who alone knows the fact, and has no motive for misrepresenting it. His statement would at once convict the pursuer [*qu. prisoner?*]

here, against a phantom of pecuniary interest ; contrast them with the cases to be next mentioned, in which, notwithstanding its being pregnant with that same interest in its most palpable shape, he gives his permit to the evidence.

SECT. III. *Exceptions to the exclusionary rule in English law—Reasons of the exceptions, subversive of the general rule.*

WHAT has happened in this instance, and what, in this as well as so many other instances, is the best thing that could happen to the laws of our jurisprudential Solons,—they are contradicted, contradicted by themselves, and at every turn. Exceptions, self-contradictions, spring up every where under their feet : exceptions, and, as far as they extend, all reasonable. Reasonable, and why ? Because, the rule itself being fundamentally absurd, every thing must be reasonable which goes to narrow its extent.

In considering the exceptions as reasonable, understand the *practice*, viz. the act of admission, and no more : for as to the reasons on

if guilty, or, if innocent, relieve him from the charge. But the law declares him incompetent ; and he is condemned to sit by, a silent spectator, hearing the case imperfectly pieced out by the opinions and surmises of other persons, on the speculative question, whether or not the handwriting is his. And this speculation, incapable under any circumstances of satisfying a reasonable mind, decides upon the life of a fellow-citizen, in a system which habitually boasts of requiring always the very best evidence that the nature of the case can admit !"—*Editor.*

which it has been built, they may be reasonable, or absurd in any degree ; the practice is what it is.

Before I enter upon the consideration of the particular exceptive rules, each characterized and supported by its appropriate reason, it becomes necessary to explain what sort of a thing it is, which, under the name of a reason, one meets with in the books of English common law.

Common law reasons may be distinguished, in the first place, into technical reasons, and vulgar reasons. By technical reasons are meant reasons that have nothing to do with utility. *Technical*, as applied to reasons, is an appellative invented by English lawyers, to denote such modes of speaking as would not pass for reasons upon any body but themselves: reasons peculiar to the art, the science, the profession. By a *reason*, speaking with reference to a law or rule of law, an unlearned man would be apt to understand, a consideration the tendency of which is to prove the law or rule of law to be conformable to the principle of utility ; *i. e.* productive of more good than evil. These vulgar or popular reasons a learned man will sometimes condescend to take up when they happen to fall in his way ; but the favourite, the privileged, reasons, are of course the professional, the scientific, the transcendental, in a word the technical, reasons ; as above described.

Leaving the scientific reasons to scientific men, as not being fit to be spoken of under the name of reasons by vulgar lips, I confine the application of the word *reasons*, when employed without any such additament, to such reasons of

the vulgar cast, as, on the occasion in question, have been honoured by the adoption given to them by scientific pens.

A great book, according to the Greek proverb, is a great evil. A law, besides what belongs to it as a book, is at any rate an evil, great or little. To form a tolerably correct judgment concerning any law, in respect of the question whether the good or the evil tendencies of it predominate,—in a word, to form his judgment on the question on which side the balance is,—every legislator and writer on legislation who understands his business, proceeds in his accounts as a merchant does in his: has a debtor side as well as a creditor, and neglects not any more to make his entries on one side than on the other.

In the books of English lawyers, the ways of speaking which one meets with under the name of reasons, are confined for the most part to one side. Such is the case in particular with the reasons corresponding to the several particular rules by which so many groups of exceptions have been attached to the general rule of exclusion on the score of pecuniary interest. To the rule itself, no reason at all appears ever to have been annexed: the utility of it has been established by assertion and assumption, without so much as an attempt to find a reason for it. To the exception has been attached a reason, such as it is; a reason, of course, in favour of the exceptive rule; a reason on that one side. The reason having been thus exhibited, its conclusiveness has been presumed as a matter of course. No marks are discoverable, on this ground at least, of any such suspicion,

as that, in the account-book kept by a legislator (supposing him to keep any), there should be two sides.

On the present occasion, in presenting a sample of learned reason on this ground, I shall confine myself to the case of an extraneous witness. The case in which the pecuniary interest at stake is that which a man possesses in the character of a party in the cause, plaintiff or defendant, is reserved for another place;\* for, in this latter case, jurisprudence, and more particularly English jurisprudence, will be found variegated by inconsistencies, for which, in the situation of an extraneous witness, there is no place.

In point of propriety, the exclusion stands in both cases on nearly the same ground. If there be any difference it is this, viz. that, sum for sum, the exclusion is more plainly useless in the case of the party than in the case of the extraneous witness. Why? Because the interest by which the will is acted upon in a sinister direction, is, in the case of a party, more conspicuously painted upon the face of the situation in which he stands. Deception is therefore so much the less probable: the mind of the judge, be he who he may, is so much the less in danger of not being sufficiently forewarned against it.

I. Exception the first. Interest against interest.

Unless the rule, out of which the exception is taken, be supposed to be bad *in toto*, the reason of the exception (if it has any) supposes

\* Part V. DOUBLE ACCOUNT.

all other circumstances equal, and the quantity of money creative of the interest the same on both sides. Against the truth of this supposition, there is exactly infinity to one. The number of possible ratios is infinite: of these the ratio of equality is one. Of the proportion between interest and interest, the exception takes no cognizance: no mention of it is made.\*

II. Exception the second. The interest contingent.

The assumptions here are two. 1. That in human affairs, at least in human affairs of this stamp, a line is already drawn between certainty and contingency. 2. That no contingent interest can be equal to any certain one. Whence came this postulate? From Euclid? From Price? From the Stock Exchange? From Lloyd's Coffee-house?

The postulate once admitted, demonstrations follow in any quantity, and to any effect.

1. That, in the case above alluded to of the duke with his £180,000 a year, his title to the

\* It must be acknowledged, that, in many of the cases in which this exception has been allowed, it has been, from the nature of the case, unquestionably certain that the interest, at least the pecuniary interest, was equal on both sides; thus, the acceptor of a bill of exchange is an admissible witness in an action by indorser against drawer, to prove that he had no effects of the drawer's in his hands; because, whichever way the suit may be decided, he is equally liable. On the other hand, there are many cases in which the interest is not really, but only nominally the same on both sides. Thus, a pauper is a good witness for either parish, in a settlement case: why? because (we are told) it is the same thing to him whether he has a settlement in one parish or in another; true, it may be the same thing; but it may also be a very different thing, since different parishes give very different allowances to their poor.

—*Editor.*

whole of it being contested, the duke at the point of death, his only son called on his part as a witness, the estate unsettled, son and father upon the terms that all fathers and all sons ought to be, the son would be a good witness. Why? Because his interest is not vested; is not certain; is no better than contingent. *Secus*, if the estate be in settlement, sixpence a year settled on the son, the father in full vigour, the son in a galloping consumption, father and son like Henry 2d and his sons: for here *le interest del filz est certain, et nemy contingent*.

Can it be necessary to observe that in human affairs, in matters of gain and loss especially,—more particularly in matters of gain and loss that depend upon law,—the difference between contingency and certainty is but in name? That what is called a *certainty*, (for even death itself is contingent as to time), is but a *contingency*, in which the ratio expressive of the degree of probability is more or less greater than in the other case? Can it be necessary to observe, that there is not that contingent sum for which the exact equivalent, in a sum called by every body a *certain* one, is not to be found? The lawyer, by whose decrees the operations of the money market are governed and perplexed, are they all a secret to him? What charity-boy, what beggar-boy, was ever at a loss to know that the toss-up of a halfpenny was worth a farthing? Alas! When will the wisdom of the sages of the law rise to a level with that of babes and sucklings?

Observe what the £180,000 a year loses in value, by being contingent instead of certain.

The proportional number of fathers by whom their only children are disinherited is—what shall we say? say one out of a thousand: say even one out of a hundred and eighty. The value of the 180,000*l.* is reduced, by this circumstance, to what?—to 179,000*l.*

Great debates, in the days of the schoolmen, concerning the comparative value, in point of interest, of a possible Angelship and a present Mouseship. Mr. Justice would be clearly for the mouse.

2. Keeper and concubine: keeper rich as a Jew, fond as the Jew in the Harlot's Progress: concubine at high allowance: keeper's whole property at stake upon the cause. Concubine a good witness.

3. Defendant a *feme sole*, maid or widow; her whole property at stake, as before; she the heiress of our duke; witness courting her in marriage, and the day fixed:—a better witness need not be desired. I know how worthless a thing a woman is, in the eye of a true English lawyer: how incapable of creating an *interest*; how incapable of exercising any influence, right or wrong, on man's affections: it was my care, therefore, to clothe her, to *invest* her, with a fee simple.

4. The duke's daughter seduced: suppose, as Clarissa was by Lovelace: she wanting a day of being of age. *Pier porte action versus seducer*: case, trespass *per quod servitium amisit*: stockings remaining unmended, which *fille* should have mended while in childbed: damages laid at 10,000*l.* *Fille* good witness: why? because no interest. What matters it to her whether she be thought to have been

defiled without consent, or to have delivered herself as Potiphar's wife would have done to Joseph?

*Secus*, the day past, and *fille* of age. *Action per pier ne gist, quia nul droit*: because no right *per faire fille* mend stockings: *issuit*, no damages *al pier*. *Action per fille ne gist, quia nul seduction, fille ne esteant dans age*: et encore *fille* bad evidence: *quia nemo debet esse testis en son cause demesne*.

III. Exception the third. But here a difficulty occurs. A reason, to be susceptible of correct scrutiny,—a reason, like any other proposition, should have for its vehicle some determinate and complete grammatical sentence. But among the words, or assemblages of words, which on this ground assume the guise and port of reasons, no such propositions, no such sentences, are to be found. What is found, consists of here and there a catchword or two, out of which, if others were added to them, reasons of some sort or other might peradventure be composed. Take, for example, the words *necessity, course of trade*. The matter of Gibbon's book has been not unaptly stated to be not history, but allusions to history; the sort of matter here in question may, in like manner, be said to consist not of reasons, but of allusions to reasons.

1. Jeweller delivers jewels to his journeyman to deliver them over to a customer: journeyman steals them. Thief good witness to prove delivery. Why? Because, in speaking of the transaction, occasion may be taken to use the words *course of trade*. Trade is certainly a good thing: but *quære*, what can it be

for a sort of evidence which, in each instance, will most probably, if not certainly, give the goods away from the right owner to a thief?

*Secus*, if the jeweller himself had delivered them: for this is not *in the course of trade*. No shopkeeper was ever known to serve a customer with his own hands.

Observe the difference: in case of mendacity, the jeweller has no interest to serve but that of gaining the value of the jewels; the journeyman has that same value to gain, and his life to save. But in the English lawyer's price-book, life is worth nothing; reputation worth as little, except when money is to be got by parting with it.

2. Action for the price of goods sold by factorage: factor paid at 5 per cent. Question about the price agreed on, whether 10,000*l.* or 11,000*l.*: if 11,000*l.*, factor gets 50*l.*, which, if 10,000*l.*, he does not get. Factor a good witness. Why? Because here too you may say *course of trade*. Had the factor delivered 50*l.* worth of his own goods with his own hands, and nobody else to prove it, he would have lost the money; for here you cannot say *course of trade*.

If, in the one case, the profit from perjury, supposing perjury, is no greater than in the other; how much greater the mischief! how much greater the loss! To gain his 50*l.*, the factor must, in the first case, have inflicted on the party injured a loss of twenty times as much.

In a case of this sort (and there are plenty of them) some, instead of *course of trade*, say *necessity*. The one word is as good as the other; any other as good as either of them. Approve

the exception, you must first have condemned the rule.

With reference to what event can it be *necessary* to admit a species of evidence which is more likely to be productive of injustice than justice? for such (as we have seen) is the fundamental proposition, which, in point of reason, forms the necessary and only basis of the rule. With reference to what desirable end? To the avoidance of injustice? To say so would be a contradiction in terms.

In these three words, *course of trade*, may be seen a complete confutation of the rule; a complete disavowal of the principle of it; a complete certificate of the non-existence of that danger which constitutes the sole reason of the rule.

Course of trade! and of what trade? Of every branch of trade, from the highest to the lowest: course of dealing, of dealings of all sorts; of every day's dealings between man and man. The persons exposed to the action of this sinister interest,—of this interest, which, sinister as it is, pecuniary as it is, as well as so much beyond pecuniary, forms no bar to the testimony,—are persons of the lowest, as well as most numerous order, servants and day-labourers; while the interest, the pecuniary interest, of itself, rises to any magnitude. And with this example not only before your eyes but in your mouths, you take upon you to deprive justice of the light of evidence, on pretence of interest!

IV. Exception the fourth. Interest created by a wager: a wager laid by the witness on the event of the cause.

Reason for the exception: A man ought not to have it in his power to deprive another of the benefit of his testimony.

What! not to deprive him of a sort of testimony which, in your view of the matter, is sure to be stained by perjury, and to produce misdecision and injustice? One thing on one occasion, another thing on another occasion. One individual must not have it in his power to deprive another of the benefit of his testimony. How often do they not, these lawyers, give that same power to individuals in other instances! How often do they not execute it themselves!

Blessed law! A law authorizing parties to hire witnesses, and witnesses to be hired: a law establishing a market overt for hired witnesses: effect given to the practice, and nothing said against it!

Wagering thus employed is subornation; nor yet simple subornation, but subornation double distilled. Subornation simply distilled is 100% promised by plaintiff to witness, to be received if plaintiff gains the cause. A wager of 100% between plaintiff and witness, plaintiff laying that he loses the cause, witness that he gains it, acts with double the force.\* In the case of

\* If the remark were worth insisting on, it acts with more than double the force: the suffering from a given sum lost being so much greater than the enjoyment from the same sum gained. What if the 100% lost were the witness's all: he could lose no more; his suffering from loss could not be increased. Supposing it so much gained, the gain would be capable of being doubled and doubled, and so on *ad infinitum*; and still the enjoyment limited enough, as, by universal confession, all human enjoyments are. Laws are in force reprobating simple gaming, and empowering the

the simple loser, though plaintiff should lose the cause, witness will indeed gain nothing, but neither will he lose. In the case of the wager, plaintiff losing the cause, witness will not only gain nothing, but he will forfeit as much as in the other case he would have gained.

V. Exception the fifth.

After observing the cases in which the excluding rules have been broken through, for reasons proper in themselves, but yet no other-wise proper than on the supposition of the impropriety of the rule; it may be curious enough to observe a case in which the rule is broken through on the ground of a circumstance out of which nothing like a reason can be made, or is so much as attempted to be made.

A time there was, when the witness was not exposed to the action of the sinister interest, to the action of which he is now exposed, now that he is called upon to speak. Well, and what then? What follows? That at that time, had he been examined, the cause which exists for suspecting him would not at that time have existed: but, for not existing then, does it exist the less at present?

Question: A man who at the time of his examination has an interest in the cause, is he an admissible witness, he having had no interest at the time of the supposed fact? Decision in the affirmative.\* Because he was under no

loser to recover back money thus lost. How innocent is simple gaming, in comparison of such wagering!

\* Modern Equity Digest, tit. Evidence, from 2 Vesey jun. 684 or 634.

“ Witness to a will, not interested at the execution or

temptation when he had not to speak, therefore, when he is to speak, knowing him to be under temptation, you are to suppose him not to be so. Just as if a pilot were to say in a storm, the vessel among the breakers, Sit still; there is no danger. Why so? Because yesterday it was a dead calm.

VI. Exception the sixth. *Voire dire*. Truth expected, in spite of interest.

One point of practice more may put a finish to this exclusionary rule, and the deviations from it. When a witness produced against you has an interest in the business (meaning always a pecuniary interest), and you cannot get other evidence of it, or do not care to be at the expense, you address yourself to the witness himself, and ask him whether he has or no: if he speaks truth, he is turned out; if he perjures himself, he is heard. This operation is called examining a witness upon the *voire dire*. *Voire dire* is, in law French, to tell the truth: and the examination is called *voire dire*, because upon this occasion the witness is called upon, and expected, to tell the truth; no such requisition being made nor result expected in other cases.

The practice, and the name found for it, are not ill matched. Speak the truth indeed? So, on this occasion he is to speak truth, is he? What is it then that he is to speak on other occasions?

On the exclusionary principle, no supposition was ever more completely *felo de se*. If

- death of the testator, is competent, though interested at  
- his examination. Borgrave and Winder, July 1795.  
- 2 Vesey jun. 684 or 634."

the man has no interest, they make sure in the first place that he will not speak the truth; and, though he have an interest, still they expect him to speak the truth.

On the principle of universal admission, nothing would be more consistent, nothing more rational, than the practice. If the situation the witness stands in exposes him to the action of a mendacity-promoting interest, he will speak under a bias: the judge should know of it, that he may put himself on his guard. Mendacious it may happen to him to be respecting this collateral fact, as well as the principal one; but mendacious he cannot be in both facts, without exposing himself to double danger. Bad as a passport to (*jargonice* say) *competency*, the examination is good as affording a clue to *credibility*.

In a modern book which lies before me, the practice of examination on a *voire dire* is spoken of as being at present out of use. How the practice itself can be out of use, I do not very well conceive. I can conceive the phrase to be out of use, and if it be, so much the better. A man might look a good while, even in the vocabulary of English law, before he would find so silly a one. Come, my honest friend, I am going to put some questions to you. To the first of them, the court expects you to speak truth: to the others, as you please.\*

\* The above-enumerated exceptions are but specimens.

In Serjeant Hawkins's *Crown Law* stands the following passage, word for word:—

“ It seems to be an uncontested rule, in all cases whatsoever, that if a person is either to be a gainer  
“ the event of the cause, whether such

We have now seen that, if it were in the nature of pecuniarily-interested evidence to

be immediate, or consequential only, he is incompetent to be a witness."

Observe well, in *all cases whatsoever*. Immediately after, comes the collection of cases, thirty-five in number, in sixteen of which, the evidence of an interested witness has been adjudged or recognized at common law to be inadmissible (including a few in which the door has been opened by special provision in a statute); in the other sixteen it has been adjudged or recognized to be admissible. In this place, therefore, the true construction of *all* is *half*; the cases conformable to the rule being, within two or three, as numerous as the cases conformable to it. Would any one wish to pick out the admissible cases from the inadmissible ones, without looking at the book? The surest way would be to draw them like blanks and prizes out of a wheel: human reason, if unsophisticated, would only lessen, instead of increasing, the chance of guessing right. Behold a sample:

*Bad, or excluded witnesses.*

1. The informer, on a penal statute giving to the informer the whole or a part of the penalty. Reason:—"for he is directly interested in the event."

2. In perjury.

The party injured, the prosecution being grounded on the statute. Reason:—because the statute gives him ten pounds.\*

*Good, or admitted witnesses.*

1. "Persons who by several statutes are entitled to rewards on conviction of offenders."

(Quære:—are they less interested, or less directly interested, in the event?)

2. In perjury also.

The party injured, the prosecution being grounded on the common law.

(Quære:—do not the statutes give ten pounds, and a great deal more, to the witnesses above spoken of?)

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\* In prosecutions in which the expense to the prosecutor is more than ten pounds, what chance would the law have of producing any effect, if the injured party were not impelled to prosecute by a motive stronger than what can possibly be had by the chance of acquiring ten pounds? especially when the position is dependent upon the success of a suit in such a suit!

give birth to any such systematical plan of legal depredation as upon a partial and hasty

*Bad, or excluded witnesses.*

3. In the case of embezzlement of naval stores; the prosecution being on the statute 17 Geo. II. c. 40, which inflicts a penalty with the moiety to the informer, or corporeal punishment without the penalty, at the discretion of the judge. The witness bad, if he is ingenuous, and owns he has an expectation of the informer's share.

(Compare this with No. 1 of the good cases, where the earning of the reward depends upon himself, the judge not having it in his power to deprive him of it, as here.)

4. In forgery, in relation to a bond, the person whose name is forged to a bond, and who offers to prove that the name signed is not his signature.

Quære, which is the most probable supposition? That, to gain a hundred pounds, D should seek to deprive another of a hundred pounds, and no more; or that, to gain the same sum, W the witness, of whom it appears that he has been trusted with that sum, should seek to deprive another of it, and of his life into the bargain? That D should be guilty of a momentary, and general, and constructive falsehood, without oath; or W of an express and circumstantial train of falsehood, upon oath?

Quære, what inducement could the man imposed upon by the bond have to let off W, the man whose name is to it, but for W's assuring him that it was a forged one, and that he would give such evidence as would convict D? and quære, what could be W's inducement to give such assurance, but the expectation of saving himself from the payment of the bond? Quære, therefore, how is the interest destr

*Good, or admitted witnesses.*

3. In the same case as on the other side, the witness good if he is disingenuous, and will not own that he entertains an expectation of the informer's share.

4. The same person, when he has got a release from him to whom the bond purports to be payable.

view might seem the inevitable consequence, the cases in which (notwithstanding the in-

[To the above exceptions to the rule excluding interested evidence, add this most remarkable one. "If a witness is sworn, and proves an instrument, however formal the proof may be, on the part of the plaintiff, he is to be considered a witness for all purposes, although he may be substantially the real defendant in the suit, and the defendant on the record a mere nominal party." *Phillipps*, i. 260.—*Editor*.]

It was at one time my intention to have given in one view, column by the side of column, the whole number of cases in which, on the score of interest (pecuniary interest), witnesses had, in virtue of the general rule, been excluded; and the cases of exception, in which, notwithstanding the general rule, witnesses equally exposed to the temptation of the same sort of interest had been omitted.

On a nearer approach, this intention has been given up. Argumentation on the question how the law ought to be, is of itself sufficiently voluminous, without being incumbered with an additional load of argumentation on the question how the law is, or rather ought to be deemed, reputed, conjectured to be.

The use of such a table would not have been very considerable. In a general view, the results of the inquiry, on the head of exclusions on the ground of danger of deception, are two:—1. That in no instance ought it to take place; but that a general statute ought to be made, abolishing it in all cases. 2. That such is the inconsistency of the course of decision under jurisprudential law, that (unless it be in the particular cases in which, notwithstanding interest, evidence has been admitted) the judge is in every case at perfect liberty to exclude the witness or admit him, as he thinks fit: that, decide as he may, he has no blame to apprehend; and that between the general principle of *stare decisis* and the pursuit of the ends of justice, in each particular case he has his choice of praise: the praise of zeal for the law, in the one case; the praise of zeal for justice in the other.

On the other hand, the embarrassment attending the construction of such a table would have been enormous. Suppose it copied, with acknowledgment, from the existing digests and indexes.

Then comes the question—Who are you? What a lawyer are you, who put your trust in indexes? Nor

his plan have been altogether free from embar-

fluence of the principle of exclusion) this seemingly dangerous species of evidence is actually admitted, are of sufficient extent to have long ago let in the mischief in full force. At the same time, a matter of fact universally notorious is, that no symptoms of the prevalence of any such mischief have ever manifested themselves.

So far is the public from ever having been laid under contribution by a system of depredation grounded on mendacity, as in the case supposed ; so far has been the practice of laying individuals under contribution in this way, by false evidence, from being realized to such a degree as to have become a prevalent practice ; that even the rewards offered to informers, —the standing invitations by which men are called upon, at all times, to lay offenders under contribution, without prejudice to truth, and to the great benefit of justice,—are not accepted to an extent sufficient to give to the laws thus endeavoured to be supported, the degree of

rassment and dissertation. Index would not always agree with index : a choice would then be to be made ; and then would come, as candidates for admission, the reasons for such choice.

2. Suppose the obligation submitted to, of taking on myself, in each instance, the responsibility of the short statement given of the case. Thus then the reader finds himself plunged in the ocean of jurisprudential law, composed, in every part of it, of uncertainties. The reader being set down in this labyrinth, the business of the author is, by dissertations upon dissertations, to make him a clue for it. The words put by one reporter into the mouths of the judges, agree not with the words of another reporter ; and when they do, they are still but the words of a reporter, not the words of a judge ; no judge is bound by them.

efficacy which the interest of the public in that behalf renders so desirable.

Men are not so forward as could be wished to dig for emolument in the mine of litigation, even by the invitation, and under the full protection, of the law. Can it be looked upon with reason as a mischief seriously to be apprehended, that men should be more forward than at present to embark in the same intricate adventure, with the reproach of mendacity and injustice pressing all the while upon their consciences, and with the fear of punishment and infamy before their eyes?

## CHAPTER IV.

IMPROPRIETY OF EXCLUSION ON THE GROUND  
OF IMPROBITY.SECT. I.—*Convicted perjury an improper ground  
of exclusion.*

THIRD general cause of exclusion on the score of deception, *improbability*.

Interest is not in any shape a proper ground of exclusion. Improbability, in whatever shape or degree, is still farther from being a proper ground of exclusion.

Entire assurance of mendacity neither ought to be, nor is, received as a ground for the exclusion of the assuredly mendacious testimony. So far from it, that, on the contrary, that sort of evidence which is most assuredly mendacious is (when applied in the manner that all mankind are in the habit of applying it) regarded even by lawyers as the "best evidence."

Evidence in which both causes of suspicion are united, and each in the highest degree, are received in every day's practice; to the great advantage, and without any prejudice, or so much as suspicion of prejudice, to justice: and this where, in case of deception, the mischief would be at its highest pitch.

These several propositions either have been, or, it is hoped, will be, established by sufficient proofs.

Let us begin with perjury. In perjury may be seen by far the strongest case: the case in which the pretence for exclusion on the score of security against deception wears the fairest outside.

Perjury is a particular modification of improbity; but a modification particularly appropriate to the present purpose. Improbity at large, according as it is more or less frequently displayed, indicates an habitual, or at least frequent, prevalence of the force of the improbity-promoting over that of the tutelary or improbity-restraining motives: a force impelling the individual into this or that line of immorality and misconduct, according to the nature of the seducing motive or motives acting in each individual case. Perjury, in addition to the prevalence of the ordinary motives on some individual occasion or occasions, indicates the particular species of delinquency into which the individual has thus been impelled, viz. mendacity: the very species by which the most plausible of all pretences for exclusion on the ground of improbity is afforded. In any other case, the argument for the exclusion is no more than this: He has violated the obligations of morality in some sorts of ways; therefore it is more or less probable that he will, upon occasion, violate them in this sort of way. In the case of mendacity it runs thus: He has violated the obligations of morality not only in some sorts of ways, but in this very sort of way, viz. mendacity; therefore it is more or

less probable that so he will on the occasion now in hand.\*

For suspicion, a most perfectly proper ground : for rejection, none whatever. Reasons, those already mentioned ; to which may be added those which follow.

\* Mendacity, on this occasion, is the only proper subject of regard : the ceremony, without which the most pernicious exercise of mendacity is not perjury, and by means of which the least pernicious is perjury, is not the work of the witness, but of the legislator. In considering, therefore, the pretence of exclusion on this ground, mendacity is the species of improbity to be considered, not perjury. Abolish oaths, you would abolish perjury ; but would the mischief of mendacity be diminished ?

The mendacity here in question is indeed the mendacity of an individual occupying the station of a judicial witness ; mendacity uttered on the occasion of judicature. To this extent, considered as a sort of presumptive evidence of future contingent mendacity in danger of being committed on an occasion of this same sort, mendacity committed on a judicial occasion in a past instance will (it is true) afford a presumption stronger than any single act of mendacity taken at large. But still, it is from mendacity, not from perjury,—from mendacity, whether preconverted or not into perjury,—that the mischief has flowed : it is to that mischief that the degree of improbity is proportionate.

If the profanation of the ceremony were alone regarded, the indication afforded by it of improbity would be very slight, or even evanescent. Such at least must be the case in a country in which this profanation is not only generally, but publicly and notoriously, practised, and at the same time unattended with the sense of shame, by men in elevated stations, and in other respects of unblemished characters. But in England, it has been seen in a former book (Book II. SECURITIES, Chap. 6. *Oath*) that examples of this profanation are thus general, even among men distinguished from the common mass by superior probity. That that ingredient in the composition of perjury should, in any considerable degree, operate as an indication of mendacity, any more than any other species of improbity, is tantamount to a contradiction in terms.

1. In this line of delinquency, beyond most, if not all others, the scale is lengthy, the degrees numerous: the highest degree upon a level with murder; the lowest, that sort of conduct (shall it be called misconduct?) which is openly and habitually practised by English jurymen; countenanced, approved, recommended by English judges.

To all these different levels the eye of judicial suspicion has the power of adjusting itself. Exclusion knows no gradations. Blind and brainless, it has but one alternative: shut or open, like a valve: up or down, like a steam-engine.

Instead of conniving at the exclusionary system, long ago would the legislator every where, if wisdom had been as easily displayed as power exercised, have exhibited a scale of this sort, for judicial suspicion to guide itself by. An attempt of this sort will be found in an ensuing book.

2. When the door of the witness-box is shut against a proposed witness on this score, it is generally on the ground of some single transgression of this sort. But a single transgression of this sort, what does it prove? The violated ceremony apart (a concomitant purely accidental, having no connexion other than accidental with the nature of the mendacity, nor with its pernicious consequences), the conviction proves no more than this, viz. that on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into, more times than one, on occasions assignable or unassignable.

“ I said ” (says the Psalmist)—“ I said in my wrath, all men are liars.” It was in his wrath that the observation came from him; but he need not have wished to retract it in his coolest moments. From a single lie told in the course of ever so long a life, a man may, without any grammatical impropriety, be denominated a liar. But, admitting that in this sense the being a liar is what, without exception, might be predicated of every human being that ever arrived at man’s estate, the truth of the proposition would not be incompatible with a probability on the side of veracity, to the amount, on each given occasion, of many millions to one. And, upon the whole, he who considers how few in comparison are the occasions in which any advantage (howsoever impure, and overbalanced by ultimate disadvantage) is to be gained by falsehood, will, I imagine, join with me in the opinion, that, from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times, for once that falsehood, wilful falsehood, has taken its place.

Again, no man is the same as himself at all times: it has been said of wisdom; it may be said, and with equal truth, of probity; it may be said, and not altogether without truth, of veracity, that most important, because all-extensive, branch of probity. The mind, of which the force has sunk under the temptation at one time, may stand against it at another: the same mind has its stronger moments and its weaker moments; without taking into the account that sort of revolution so much oftener talked of than exemplified, a thorough change.

On the part of the temptation, likewise, the strength of it is liable to variation (as hath been already noted), upon a scale distinguishable to an infinity of degrees.

From a man's having borne false witness in some one instance, (or even, as we shall see presently, without any such warrant, and merely from his having done or thought, or having been supposed to have done or thought, something wrong, in some other way that has nothing to do with falsehood,) it is inferred, and that with the most peremptory assurance, that he will never bear true witness in the whole course of his life! An induction, and such an induction, grounded on a single instance!

To pronounce a man guilty of any other offence without the opportunity of a hearing, is allowed to be the summit of injustice. To pronounce a man in the same manner guilty of an intention to commit perjury, is given, on this occasion, as a most refined invention for the furtherance of justice!

He *was* heard (it may be said): he was heard, before he was pronounced guilty of the fact on which the incapacitation was grounded.—He was heard; yes: but upon what occasion? On the occasion on which he is deemed incredible? No: but on the occasion of a transaction altogether different: which may have happened yesterday, it is true; but between which and the occasion in question, an interval of half a century may, for any provision the rule makes to the contrary, have elapsed.

The exclusionist, at any rate, is estopped from representing conviction of perjury as a

mark of distinction between the unfortunate liar in question, and other men. According to him, perjured or unperjured before, every man for the most trifling profit is ready to commit perjury.

From all this, is any such inference to be drawn as that perjury is a light matter? that it is no stain upon a man's character? that it affords no presumption against the truth of his testimony in succeeding instances? Far be it from me to have harboured, for a moment, any such conceit. What I am contending against, (let it never be out of sight) is absolute rejection: rejection in all cases:—not suspicion and distrust. The very repugnance, with which it is but natural the reader should have received the proposition of opening the door of justice to testimony of this tainted kind, is a sort of proof and earnest of the safety of the measure. The same precipitate emotion, under the influence of which the man of experience, the man of law, has so generally shut the door against testimony thus stigmatized, may be expected to act upon the whole with equal force, and with quite as much as its due force, even upon men of his own elevated level: much more upon the unthinking multitude below. So broad, so prominent is the stigma,—so conspicuous and impressive the warning which it gives,—the danger is, not that the man thus distinguished should gain too much credence, but that he should not gain enough. *Fenum habet in cornu.* Suppose an inexorable door shut against him; or, although open, suppose an inexorably deaf ear turned to him; and observe the conse-

quence:—that crimes, all imaginable crimes, may be committed with impunity, with sure impunity, on his person and in his presence.

When the perjurer is a principal in the cause; when the person on whose part false testimony is apprehended (apprehended on the ground of false testimony given in a former instance) and the person whose purpose would be served by the false testimony (whose interest, it is apprehended, may be the efficient cause of such false testimony) are one and the same; in this case, it is only on the part of one person that the improbity is presumed: and in his instance the presumption is but too well justified by former experience. But suppose the perjurer not himself a party, but only called in by a party, in the character of a witness: how stands the presumption then? Without subornation on the one part, perjury on the other part is, in this case, I do not say an impossible crime, but at any rate not a natural one. Spontaneous perjury, to serve a person who knows nothing of it, and who, therefore, does not so much as conceive himself to be obliged by it, is certainly a possible case, but it is not a natural one. But, if perjury on the part of the witness supposes on the part of the party a sort of subornation, more or less explicit,—how stands the danger, how stands the supposition, when, to produce the apprehended mischief, criminality, and in this high degree, on the part of two different persons, must have taken place? On the part of one of them, the presumption indeed has a ground to stand upon: but on the part of the other, it has no ground. Will it be said, that the invoking, in this way, the aid of a

person thus exposed to suspicion, affords a suspicion but too natural of a connexion in guilt? The suspicion might have some force, if, on all occasions, or on most occasions, a man had his choice of witnesses. But in general the case affords no such choice. Chance, the same chance which gives birth to the offence, or other cause of dispute, (to the offence, if real, or to the event which disproves the reality of it, if the accusation be groundless)—this same chance brings to the spot the witnesses, by whose testimony, if obtainable, the cause is to be decided. To have his witnesses to drag out of the house and the very bosom of the adversary, is no uncommon case.

Cases, however, there are, in which a man has usually his choice of witnesses; actual *observing* witnesses to the transaction; eventual *deposing* witnesses in case of litigation. I mean the case of attesting witnesses to conveyances and other contracts. Apply the rule of exclusion for perjury to this case. Because my witness has since perjured himself, am I to be deprived of my estate?\*

\* Where a witness, who at the time of the transaction was an uninterested one, has since given himself an interest in the cause, as, for instance, by a wager, English lawyers have decided—and with indisputable justice—that, by this act of the witness, the party shall not be deprived of the benefit of his testimony. The damage which a man is not allowed to do by an act otherwise so innocent as that of a wager, shall he be allowed to do it by so criminal an act as perjury?

[It is rather curious, that, while the attesting witness, if he has happened to perjure himself since he signed his name, would not, I suppose, be admitted to prove his own signature, he is admitted to disprove it: “a person who has set his name as a subscribing witness to a deed or will, is admissible

In considering whether improbity, and in particular whether this strongest case of it, ought, in point of policy, to be considered as a ground for the exclusion of testimony; the consequences in point of utility to the public taken in all its parts, have, on this occasion as on every other, been taken by me for the standard of right and wrong. But the consideration of these consequences, has it in general been the efficient cause of the decisions given on this head, in the established systems of jurisprudence? To a certain degree, yes; exclusively, certainly not. In the legislation and jurisprudence of various nations, and of England among others, the offender, not the community injured by the offence, has been the object in view; antipathy, not benevolence, the prevailing motive. Infamy, and (as a visible sign of infamy) exclusion from the sanctuary of justice, has been a lot of punishment superadded to what other lots were found at hand; a sort of make-weight punishment to fill up the measure. It is one of the instances, which, in but too great number, may be found in the English as well as other established systems, of the sort of punishment that has been called *mis-seated punishment*: punishment *in alienam personam*: a sort of punishment which, in this particular application of it, may be styled *chance-medley punishment*. The punishment does not fall

to impeach the execution of the instrument;”\* although by so doing he confesses himself to have been guilty of a crime which differs from the worst kind of perjury only in the absence of oath, from forgery only in name.—*Editor.*]

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\* Phillips on Evidence, i. 39, and the cases there referred to.

upon the witness who is disqualified, but upon all persons who may have need of his evidence. A certain person has offended, and, to add a sting to his punishment, an unoffending crowd is collected below, and a pailful of punishment is thrown down upon their heads out of a window. An innocent stranger is laid hold of, and a sword run through his body, that with the point of it a useless scratch may be given to the caitiff who has provoked all this vengeance.

SECT. II. *Inconsistencies of English law under this head.*

UNDER English jurisprudence, the testimony of a proposed witness, if previously convicted of perjury, is altogether inadmissible. So says the general rule. Not that exceptions are altogether wanting.

1. Exception the first. A piece of parchment called a *record* having been rendered necessary; if any body has contrived to keep it out of the way for a few minutes, the perjurer's evidence is good evidence.\* What the record (such part of it as is not itself mendacious) can exhibit of the case, is as nothing in comparison of what the judge's notes might shew, or the testimony of another person present at the trial on which the perjury was committed. But production of the lying parchment produces fees; production of the other evidence would not yield fees.

The oracular and sacred character attributed in the books to every thing that bears the name of a *record*, is grounded on the supposition that

\* Leach's Hawkins, § 1

the instrument, if not the composition of the judge, has at any rate been authenticated by his perusal. This supposition, unless by the merest accident, is never true. While all this honour is paid to the spurious document, the genuine one, which actually is the composition of the judge himself who tried the cause, passes unregarded.

Admitting the judge's notes as the best of all evidence, when it happens to be attainable; one species of evidence there is, which cannot but exist: a species of evidence scarcely inferior to the judge's notes, and greatly superior (rationally speaking) to the second hand as well as un-circumstantial evidence furnished by the copy of the record: and which is sure to be not only attainable, but actually present, and that without expense. This is no other than the evidence of the perjured witness himself, whose conviction, on the account in question, is supposed to have taken place. This, however, is too sure, and simple, and cheap a method of coming at the truth, to be allowed of.\* An observation that appears to have been made on this subject is, that when a man has been convicted of a crime, it would be an unpleasant thing to him to speak of it; and thence it is that a man, whose testimony, if admitted, will be sure to be delusive, (for that is the supposition), is to be admitted to give this delusive testimony, rather than that any questions should be put to him concerning a fact on which perjury without detection would be impossible. But, if its being unpleasant to a man

\* 4 Leach's Hawkins.

is a reason for not asking him a question, *à fortiori* it ought to be a reason for not punishing him: for how unpleasant soever it may be to a man to say, I have been whipped, pilloried, or transported, the operation of whipping, pillorying, or transporting, should, one would think, be still more so.

In no possible case can the unpleasant circumstance in question, the punishment (if it is to be called one), be surer of not falling upon one who is innocent, than in the present; for if he to whom the question is thus put, whether he has been convicted of such or such an offence, never was convicted of it,—how it should ever happen to him to forswear himself, and answer in the affirmative, unless he takes a pleasure in forswearing himself to his own prejudice, is scarcely to be conceived. How well disposed soever a man may be to be unjust to others, there seems to be no great danger of his being disposed to do injustice to himself.

This preference of the interests of the guilty to those of the innocent, how absurd soever in all cases, will at least have the effect it aims at, in the case where, if a witness is not liable to be exposed by his own confession, he is not liable to be exposed at all; in those cases (some such there are) where no other evidence of specific criminality is permitted to be adduced. But where the difference in point of unpleasantness is no more than what there is between the confessing his own guilt, and the having it proved to his face by evidence which is deemed still more convincing, such as the production of the record of his conviction,—what possible use there is in this tenderness,

even to the criminal to whom it is shewn, seems not very easy to point out.

2. Exception the second. Where the stain upon the testimony has been done away by any of the approved restoratives: of which in the chapter of restoratives.\*

3. Exception the third. Where the testimony, being self-regarding, viz., that of a defendant, is delivered in the shape of affidavit evidence, and "in relation to the irregularity of a judgment in which such person is a party." (This then must have been in a civil suit. What if in a criminal suit? Try the cause, and then you will know. Examine the authorities, and the farther you examine, the farther you will be from knowing.)

The reason is a good one: provided always that the rule be, in the first place, acknowledged to be absurd and mischievous. "It hath been ruled, that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment in a cause where such person is a party; for otherwise he must suffer all injustice,† and would have no way to help himself. But it can only be read in defence of a charge, (*i. e.* against a charge), and not in support of a complaint."‡ Not that, in the sort of case thus excepted, the reason is by any means so good as in the other sort of case so carefully distinguished. All other evidence being supposed, in both cases, unattainable; in what respect is a man less exposed to suffer all

\* *Infra*, Chap. 7. † In Salkeld, it is "*injuries*."

‡ Leach's Hawkins, § 103.

injustice by not being admitted to give his own testimony in support of a complaint of his own, than by not being admitted to give it for the purpose of defending himself against a charge? In other words, in what respect is he less exposed to suffer injustice, by not being permitted to give his own testimony in his own behalf when plaintiff, than when defendant? On the contrary, the danger he would be exposed to from injustice would be greater if the proposition were reversed. Debarred from being heard as a witness for himself in the character of *defendant*, he is exposed to no injuries but such as may be attempted to be inflicted on him by the intervention of the hand of justice: debarred from being heard as a witness for himself in the character of *plaintiff*, he is exposed to all injuries without exception.

From a charge, he cannot, in the way of conviction, be a sufferer, but upon the supposition of a suit of some kind or other instituted, and perjury committed, or at least misrepresentation made, in support of it, with the judge upon the watch to protect him against it. In this case, the scene of the injury lies *in curiâ*; and there he has the probity and compassion of the judge for his defence. In the opposite case, it has lain (*jargonice*) *in pays*: and there, whom had he for his defender? If the adversary had ordinary prudence, seconded by ordinary good fortune, nobody. Suppose yourself for a moment, gentle reader, in this unpleasant predicament: put into it, not by any perjury of your own (you would not forgive me the supposition), but by the united perjury of two wicked adversaries. Invited by these lawyers,

your enemy, being stronger than yourself, and catching you alone, may beat you to a jelly : or (if it be more agreeable to him), first having tied you to the bed-post, he violates your wife and your daughter, they also being perjurers or quakers, in your presence. Of himself, the privilege thus given him could hardly have occurred to him. But he has overheard a lawyer brag of it as a good joke ; or he has found it in a book by accident.

Examine the case in another point of view, and now with the eye of an exclusionist : you may see another reason for taking the exception (if an exception there must be) elsewhere rather than here. Let it be in his own cause, and, therefore, in his own behalf : here is interest in the case, and to a certainty : whereas, if the cause be one to which he is not a party, and in which he has no natural interest, perjury on his part, if unbribed, will be without a motive ; nor can he be bribed without a person able and willing and bold enough to offer him a bribe ; three conditions which do not meet in one person every day.

There remains yet one part of the case, which, on different occasions, has been brought to view already. When the most suspicious of all evidence (so far as improbity is concerned) is received, in what shape is it received ? In the shape of *vivâ voce* evidence, the deponent present in court to be examined and cross-examined by the adversary and the judge ? Oh, no : this is exactly the shape in which the door was just now expressly shut against it. Oh, no : the dish must be served up in the shape of affidavit evidence, dressed at

leisure, with an attorney to dish it up: a licensed accomplice to help cook the poison, and no taster to detect it.

Thus, in regard to the exclusions grounded on improbity, stands the matter upon the face of the books. But such is the infelicity of the subject, such the felicity of the profession, there is no trusting even to the freshest of their books. The apparent uncertainty of the law is such as we have already had a glimpse of, and such as we shall see in a fuller and fuller light in proportion as we advance: but the real and latent uncertainty of the law (I speak always of the common law) is still deeper and more profound. Ever unfathomable, essentially fluctuating: such is the ocean, such is the common law.

Inquiring among professional friends the degree of observance given to the rules excluding witnesses on the ground of improbity, I learn that judges may, in this point of view, be divided into three classes. Some, treating the objection as an objection to credit, not to competency, admit the witness, suffer his evidence to go to the jury, presenting the objection at the same time, warning the jury of the force of it, and when thus warned, leaving them to themselves. If, after this warning, the jury convict a man of whose guilt the judge from whom they have thus received the warning, is not satisfied; from thence follows, as a matter of course, a recommendation to mercy, from whence follows, as a matter also of course, a pardon. Another class suffer the testimony to be given, but if they do not find it corroborated by other testimony, direct the jury to acquit, paying no regard to it. A third class,

they understand that no other evidence is to follow, refuse, in spite of all authorities, so much as to suffer the jury to hear the evidence.\*

Of what individuals these several classes are respectively composed, I do not know, and should be very sorry to be obliged to know. The object in all these cases is the preservation of the innocent. To this object there are these three roads, all equally effectual: the first, a rational course, and conformable to law, meaning always the published, the known, the knowable dispensations of the law;—the second, arbitrary, assuming, self-willed, trespassing upon the regard due to the free agency of juries, unconformable to the spirit of the constitution, but containing nothing absolutely repugnant to any peremptory injunction of the law;—the third, equally and completely repugnant to reason and to law.

Under the jurisprudence of ancient Rome, the great and powerful judge called the prætor used, at the commencement of his prætorship, to hang up for the information of the suitors, in a conspicuous situation in some public place, a table of the rules by which he proposed to govern himself during his year.

Of the three different courses taken, as above mentioned, in relation to the same business, by so many classes of English judges, I, having no other interest in being informed than

\* The reader should be informed that these pages were written somewhere about the year 1803. Whether any greater degree of unanimity exists on the bench, in regard to these matters, at the present day, perhaps nobody knows: it is hardly worth knowing.—*Editor*.

what I possess in the general capacity of an English subject, should be unwilling to know which, on any given occasion, has been or would be taken by any individual judge. But, in the capacity of a prosecutor in any of the cases in question, were it ever my misfortune to find myself standing in that capacity, it would certainly be highly material to me to procure (if it were possible) two tables: the one a standing one, containing the names of the twelve judges, each being accompanied with the designation of that one of the above three courses which it is his practice to pursue; the other an occasional one, containing the names of the judges, who, upon the trial of the cause in which I was in a way to be prosecutor, would be destined to preside. If the judge I saw reason to expect was a judge who would suffer a jury to hear, and to act as if they heard, I would under his auspices take my chance for bringing the truth to light: but if he were either a judge who would not suffer a jury to hear, or one who would not suffer them to act as if they heard, most certainly I would have nothing to do that I could avoid doing, in the way of prosecution, under the direction of such a judge.

It would be equally incumbent on me to decline bearing a part in any such sham trial, whether I consulted the rules of personal prudence, or those of social duty; whether I regarded the effect of such a prosecution in the way of burthen on my own finances and my own ease, or, in the way of example, on the conduct of those to whom, in the capacity of persons exposed to the temptation of offending,

information of the practice in this behalf might be of importance.

The example is bad, when a man supposed to be guilty is seen to remain unprosecuted. But the example is much worse, when a man supposed to be guilty is seen to be prosecuted, but prosecuted under circumstances in which it may be and is known beforehand that prosecution will be to no purpose; saving always the impoverishment and harassment of the prosecutor, — impoverished and harassed already by the injury, impoverished and harassed commonly still more, by the fallaciously offered and really withholden remedy. The escape for want of prosecution, is the simple escape of a guilty man from punishment: the escape taking place after prosecution, and effected by such means, is an example of the triumph of him who is guilty, and of the punishment of him who is innocent and injured.

SECT. III. — *Improbability in other shapes an improper ground of exclusion.*

IF from that modification of improbity which consists in a breach of veracity on the very sort of occasion in question (viz. judicial testimony), no sufficient ground for exclusion can be deduced; much less (it is evident) can it, from improbity manifesting itself in any other shape. English jurisprudence furnishes in this part of the field a rich harvest of learning, which whoever has an appetite for absurdity may go and feast upon, at the table spread for him by Hawkins, Bacon, and Comyns, with their ever-clashing authorities.

Looking into the offence for this purpose being a process to which thought, howsoever misapplied, is necessary, and thought being attended with trouble, sages have substituted a more expeditious operation, which is, the looking at the punishment. Treasons, felonies (unclergyable and clergyable), *præmunires*, misdemeanours:—by these denominations are expressed all the distinctions they know of, in point of malignity (or say improbity), between one group of offences and another: and, except the obscure and mostly incongruous intimation given of the nature of the offence in the case of treason, and the undistinguishable intimation of misconduct or delinquency in general conveyed by the term misdemeanour, none of these terms affords any the slightest intimation of any intrinsic quality in the offence itself, nor of any thing else belonging to it, but the accidental circumstance of the punishment that has been attached to it.\*

A system of arrangement is good or bad, instructive or fallacious, according as the objects ranked under the same division possess more or fewer properties in common. In the system in question, the objects not possessing any

\* Of late, it seems to be established, that the question, infamy or no infamy, is to be decided by the consideration, not (as formerly) of the nature of the punishment, but of the nature of the offence: and for this decision credit seems to have been taken, as for a conspicuous stride in the career of liberality and improvement. But what becomes of it, when it is considered that the conception even of the offence has no better ground than the observation of the punishments that have been annexed to it? And admitting the distinction to have been ascertained, is there any consistency in supposing that a judge will in any instance have attached an infamous punishment to an offence not infamous?

essential properties in common; any inference grounded on the place occupied by the object in the system, must, in the case of this system as of any other, be proportionably inconclusive. To make a complete perambulation of the whole chaos, would, for this or any other purpose, require volumes upon volumes. A sample or two must serve instead of a complete list.

To judge of offences by punishments, the most detestable of mankind should be found in the class of traitors. Treason being the sort of act most offensive to those whose dependent creatures judges used to be, treason is, in the eye of jurisprudential law, the very pinnacle of improbity. In the character of a witness, a traitor, of course, supposing him to remain with his bowels in his body, never could be heard. Reason, unless the case were particularized, would never know what to think of it: of what sort of disposition (if of any) to regard it as evidentiary, whether of vice or of virtue. Enemies must be resisted; traitors must be punished: but to a traitor it may happen to be among the most profligate or the most virtuous of mankind. Occasions there are in abundance on which traitor or no traitor depends upon bad success or good success. Take a monarchy, and suppose the title to the crown (the legitimacy, for instance, of the heir-apparent of the last monarch) to be in dispute. Half the people believe the legitimacy; the other half disbelieve it. Each half are traitors, to the other half. Which are so by law? It depends upon the course taken by a few balls of different sizes. But will it be said that the course taken by the balls affords any indication of the

side on which the greatest proportion of veracity is to be found? In cases like these (not to speak of concealed traitors), every non-juror at least is at his heart a traitor. But is he the less trustworthy? On the contrary, who does not see that he is by so much the more so? His adherence to veracity, his insensibility to the force of sinister interest, is established by the most incontestable evidence; by evidence such as no adherent to the successful side has it in his power to give.

During the warfare between the two roses, that is from generation to generation, the good people of England, good and bad together, were alternately loyalists and traitors: consequently, if the men of law were fit to be believed, in all that time scarce a man in the country that was fit to be believed.\*

By a numerous and respectable description of men, probably by a great majority of those

\* Look back, as above, to a few hundred years' distance in the track of time, you see a whole nation composed of traitors. Look on to a few hundred degrees' distance in the track of space, you may see a whole colony composed of felons: and felons not *in posse* merely, like the traitors, but *in esse*, duly converted into that state in due form of law. Upon the evidence of this or that one of those felons, this or that other of them has from time to time suffered death: murdered, thereby, or not murdered, is a question I leave undiscussed for the amusement of those who sent them there.

Question for a law debating club: Where are we to look for the worst murderers; to the Court of Common Pleas hanging a man upon good evidence,\* or to a New South Wales Criminal Court hanging a man upon such bad evidence, that is, upon no evidence?

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\* Said to be murder. (Hawkins.)

to whom the history of their country is an object of interest, Russel and Sydney, Russel at any rate, seem to be regarded as patterns of heroic virtue: of virtue, not simply in respect of the general tenour of their lives, but in respect of the very act which brought the life of each of them to its close. Both patterns (let us say) of heroic virtue: yet, if in the eye of the law (for that is the question) these men were not traitors, what men ever were or can be?

Next below treasons stand unclergyable felonies. Among these, take homicide in the way of duelling.

Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear, and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it, has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, and the inference of the law is, that he cannot open his mouth but lies will issue from it.

Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion. Take it for a ground of suspicion only, all these absurdities are avoided. On each occasion every man is judged of by his own works. A man is not pronounced unworthy of credit, merely because other men, who have com-

mitted other acts accidentally called by the same name as some act of his, are supposed unworthy of credit. The suspicion is founded, not on the *class* of the offence (which, as offences are classed, shews nothing); nor yet on the *genus* of the offence, an indication still pregnant with delusion; nor, more implicitly, so much as from the *species*; but rather from the individual offence: and thus each shade of delinquency raises up that shade, and that shade alone, of suspicion, that belongs to it.

If the legislator had his choice of witnesses upon every occasion, and witnesses of all sorts in his pocket, he would do well not to produce any, upon any occasion, but such over whose conduct the tutelary motives exercised despotic sway: in a word, to admit no other men for witnesses than perfect men. But perfect men do not exist: and if the earth was covered with them, delinquents would not send for them to be witnesses to their delinquency. In such a state of things, then, the legislator has this option, and no other: to open the door to all witnesses, or to give license to all crimes. For all purposes, he must take men as he finds them: and, for the purpose of testimony, he must take such men as happen to have been in the way to see, or to say they have been in the way to see, what, had it depended upon the actors, would have been seen by nobody.

A very short argument might be sufficient to satisfy us of the insufficiency of all arguments drawn from the topic of criminality in the lump. The evidence of an accomplice is admitted, whatever be the crime; at least (which is abundantly sufficient for the purpose) in crimes which are regarded as being of the deepest die,

and affording the strongest ground for exclusion, in the instance of a witness whose criminality, whether of the same or a different species, is of less recent date.\*

Supposing criminality in general to be a just ground of incapacitation in this behalf, on the part of a witness produced in favour of a criminal prosecution; the criminality manifested by a participation in that very crime, would afford a juster ground than can be found on the part of a criminal not in the same predicament.

Superior certainty, and superior freshness, are circumstances that concur in giving to the ground of exclusion, in this case, a degree of strength which is scarcely to be found in any other.

First, in regard to *certainty*: certainty of past depravity. In other cases, the evidence of criminality (the only evidence admitted by the law) is the record of conviction. But the conviction *may* have been erroneous: the man may have been innocent, though the jury thought him guilty. Here he says himself he was guilty; and unfolds all the circumstances of his guilt: circumstances without which it would not have been in his power to display the guilt of the accomplice against whom his evidence is produced.

\* Most commonly evidence of this description has other evidence of some sort or other, though frequently but circumstantial, to support it; indeed, it is seldom that circumstantial evidence can be altogether wanting. But instances have happened in which the decision (the verdict of a jury under the direction of a professional judge) has been grounded on this without any other evidence: such is the credit that has been given to it, and may still be given to it at any time.

Next, in regard to *freshness*: for on freshness depends the presumption of *present* depravity, without which, *past* is nothing to the purpose: of present depravity, as rendered probable by past. In other cases the criminality *may*, it is true, be recent: but what is equally true, is, that it may be any number of years anterior to the time when the testimony is given. Long before that period, the crime may have been for ever buried in oblivion, and the character regenerated. Here, the taint on the evidence is as fresh as the crime, by the prosecution of which the evidence is called forth.\*

\* The reason, in point of common sense, for the exclusion, in the case of a *particeps criminis*, is thus strong. But the technical reason, the only sort of reason which a lawyer ever cares about, failing; the reason to which so much importance is pretended to be attached on other occasions, the reason founded on the probability of mendacity, is thrown aside. In law it is not *criminality* that incapacitates, but *infamy*. Now infamy, like most other words which have been borrowed from the language of ordinary life by the language of law, has two meanings; one meaning when uttered by unlearned, another meaning when by learned lips. When a person who is not a lawyer hears of *infamy of character*, he usually supposes that it is the same thing as criminality; or, at least, that, when there is no doubt of a man's having committed a crime, it does not need the assistance of any such thing as a speech, from any such functionary as a judge, to render him infamous. Lawyers, however, have determined that infamy is the consequence, not of the *crime*, nor even of the *conviction*, but of the *judgment*. Now, as the accomplice, who turns what is called king's evidence, usually has not been tried, he cannot have been convicted, nor consequently can judgment have passed against him. There is no infamy, therefore; and consequently no untrustworthiness. Let him even have been convicted, and on the clearest evidence, so judgment have not passed, he will speak the truth: but so soon as it has passed, he is unfit to be believed; from that moment he is a liar. It might appear, nevertheless, to common sense, that,

In a double view, so far as the danger of deception is concerned, this single example ought to be regarded as conclusive: in the character of a proof from experience; and in the character of an *argumentum ad hominem*.

In the character of an appeal to experience.

The temptation, at the highest pitch: the individual exposed to it, an individual belonging to that class in whom the proneness to yield to temptation is at the highest pitch: the force of the mendacity-prompting motives at the highest pitch; the force of the mendacity-restraining motives at the lowest pitch: and yet mendacity itself unfrequent in comparison of veracity, and, at any rate, (what is the only thing ultimately material) deception, and consequent misdecision, extremely rare.\*

In the character of an *argumentum ad hominem* its operation seems to be still more forcible.

When, in case of deception and consequent

other things being the same, it can make very little difference in the probability of a man's telling the truth, whether or no certain words have been uttered by a judge.—*Editor*.

\* The absence of complaint on this ground is the more remarkable, and adds the greater force to the argument, inasmuch as on other grounds the effect of the permanent offers of reward held out by statute has been matter of frequent and just complaint. Rewards to different amounts being held out for crimes regarded as rising one above another in malignity, professional men forbear to inform against a man till his guilt has risen to such a pitch as to entitle the informer to the highest, the 40*l.*, reward. It is, or at least is supposed to be, a point of policy not to gather the fruit till it is ripe. The whole system of rewards offered to accomplices in first-rate crimes, a system unknown upon the continent, has grown out of the exclusion put by English law upon self-criminating testimony: of which in its place.

misdecision, the mischief is so great; when, in a word, it is at the highest possible pitch, amounting, perhaps, to the murder of an innocent man; you scruple not to give admission to the evidence. Every day you admit it, you all admit it: by none of you has so much as a suspicion been entertained, or at least been professed to be entertained, that the admission of it is, upon the whole, unfavourable to the interests of truth and justice. Yet, where the temptation amounts to nothing; where the capacity of opposing to the temptation (if there were any) that resistance which probity requires, remains unimpeached; and where the mischief, in case of deception and consequent misdecision, is next to nothing; even there, if but the shadow of an interest flit before your eyes, you scruple not to shut an inexorable door against the evidence.

We have seen, in some measure, what is to be thought of the incapacitations grounded upon interest. We now know what to think of the incapacitations founded on criminality. Add *interest* and *criminality* together, and observe what follows. Interest incapacitates; criminality incapacitates: interest and criminality, each in the highest degree, do not incapacitate. In grammarians' logic, two negatives make an affirmative: in lawyers' logic, two affirmatives make a negative. In vulgar arithmetic, one and one makes two: in lawyer's arithmetic, one and one makes not two, but nothing.

Oh! but lawyer's interest is pecuniary interest: and this interest, which, being added to criminality, removes the incapacitation, is only

the mere interest of self-preservation in regard to life, and nothing more.—Well then, add pecuniary interest: add lawyer's only interest to other people's strongest interest: put three grounds of incapacitation together: instead of two, the three put together still make nothing, as before. A pardon, together with a reward, is offered to one conspirator for the discovery of another: neither reward nor pardon given, unless the man informed against is convicted. This is every day's practice. Such is the invitation: and the doors of justice are thrown open to the scum of the earth thus collected. After this, split hairs, and raise quibbles about a farthing's-worth of interest in one shape, and a farthing's-worth in another.\*

\* One species of evidence, evidence of the most useful kind, is by this exclusionary rule inexorably shut out. The evidence admitted is that of a partaker of the crime, who, in recompense for such evidence, obtains the equivalent of a pardon: indeed, more than the equivalent of what is granted under that name. This man, then, upon requisition, gives information of as many crimes as he has been witness of; or at least of as many as, being known to be acquainted with, he is required to give evidence of. But the persons convicted with or without such bought evidence, have, many of them (perhaps most of them), their catalogue of crimes of others to which they have been privy, and which, if required and admitted, they might be instrumental in bringing to justice. Such evidence would not always be given: the quality or quantity of inducement necessary to the extraction of it would not always be found. It would, however, sometimes, perhaps not unfrequently, be found: conscience, which so often produces from a man the confession of his own crimes, would naturally have less difficulty in producing the relation of those of other men. Whenever it happened to be produced, a more unsuspecting species of evidence could hardly be found any where: were it obtained by hopes of pardon, it would indeed in that case be upon a footing, but no more

SECT. IV. *If exclusion on the ground of convicted mendacity were justifiable, English lawyers and judges should be excluded.*

FIRST, as to the professional lawyer, the lawyer in full practice. I speak not of attornies, who, when it happens to them to lie, lie rather in deportment than in language, in deeds rather than in words: or, if in written words, in words prepared for them by the client's lips. The indiscriminate defence of right and wrong, by what is it kept up, but by the indiscriminate advancement of truth and falsehood?

What the perjurer has done once, and perhaps but once, the advocate is doing in every day's practice. Occasion, motive, every thing the same, except the punishment and the ceremony: the kiss given to the book in one case, not given to it in the other.

The perjurer makes a lie, the advocate circulates it: the perjurer gives words to it, the advocate effect. To what amounts the difference? To the same as between the part borne by one man and that borne by another in a plan of forgery.

than upon a footing, with the evidence obtained by the virtual sort of pardon above mentioned: when afforded without hopes of pardon, it would naturally and almost certainly be the pure result of conscience. In capital cases more particularly, corruption would be, practically speaking, out of the question, since, by the supposition, the man would almost immediately be out of the reach of all earthly reward as well as punishment. It is just possible, but not at all probable, that, for the sake of eating and drinking a little better during the short interval before death, he should designedly produce the destruction of a fellow-creature.

The lawyer indeed has his license to plead, his license under the seal of the moral sanction: the perjurer has no such license. Unquestionably the license makes a difference: contempt and power sit not on the same head.

One difference requires to be marked. The license granted to the advocate confines itself to the case where it is in that character that he acts: where it is to the use of others that he lies. As truly as the courtier said, *non omnibus dormio*, the advocate may say, *non omnibus mentior*: for (the fee, and the reputation of impressive and successful lying, excepted,) if he lies to his own use, he goes beyond his license.

But when the habit, thus in ceaseless exercise, has been matured into a second nature, is it so natural that the line thus faintly marked out should never be crossed? Is it not more natural that, as public wrongs have been known to mix with private, the concerns of others should, to this purpose, now and then mix themselves with a man's own?

*Concessum est oratoribus aliquid mentiri in historiis.* To the orator who laid down the rule, was it an unfrequent occurrence to see him affording the example?

To a butcher, it may happen to be a man of humanity: he has a license for shedding blood, a license sealed with the same seal as that under which the advocate acts in the utterance of falsehoods. The license extends to quadrupeds of all sorts; it does not extend to bipeds, or at least to bipeds without feathers. Yet, when human life is at stake, a butcher is never put upon a jury.

It seems scarcely in the nature of things, that,

in point of testimonial trustworthiness, the testimony of a professional advocate should, in any country, or under any system, be, in the eye of reason, altogether upon a level with that of a man of an equally cultivated mind in another station, taken at random. But whatever untrustworthiness may be found attached to the character on European ground, by far the greatest part of it will be found referable to the technical system; and whatever ulterior degree of untrustworthiness may be found attached to it on English ground, will be found referable to the peculiar degree of malignity to which the endemial disease of that system has risen in England.

Under the natural system (were it ever restored),—under the most perfect system imaginable,—the profession of the advocate never could cease to be necessary, how much less soever might be the demand for the exercise of it. But, under the natural system, the advocate is only the assistant, the bottle-holder, of the suitor; under the technical system, the champion, the substitute.

Under the natural system the suitor being essentially present,—present, so long and as often as any matter of fact, coming in any way under his cognizance, is in question,—there stands somebody, there stands the suitor in his proper person, responsible for the truth of every thing that is said in his behalf: the person so responsible is always present in the face of the bystanders and the judge: in vain would the advocate, the echo, the hearsay witness, pretend to believe what the principal, then standing before him, dares not venture to assert, or at any rate to persist in.

When the client is out of the way, not only of punishment but of shame, the advocate (no longer the bottle-holder but the substitute) soaring on his own wings, believes, and proclaims aloud, whatever is most convenient to be believed. His gospel is in his hand; in his brief he beholds his sufficient warrant: from beginning to end, the paper may be composed of lies, of lies replete with infamy, but the weight of it falls not on his shoulders.

In the writings of lawyers, a topic which, of course, cannot be an unfrequent one, is the respectability of the professional character: the transcendant excellence of the functions in the exercise of which it manifests itself; whatever in talent is most brilliant, whatever in learning is most profound, joined together and acting in the service of justice. What a maker of sticks has never yet been known to forget, is, that to every stick there are two ends: what a maker of this sort of panegyric takes care never to remember, is, that to every cause there are two sides, and that only one of these can possibly be in the right.

Another case which presents itself as a subject of examination, in regard to exclusion of testimony on the score of appropriate improbity, is that of English judgeship.

In speaking of this case of habitual mendacity, nothing farther will be requisite than the marking those circumstances which concur in distinguishing it from the last preceding case.

Meantime, lest the condition of being habitually stained with this degrading vice should be regarded as a necessary one, indelibly attached to one of the most exalted functions

in government, it may be proper to premise, that England is the country on which the imputation will be found to rest, if not to the exclusion of any other, at least in a degree of most prodigious pre-eminence.

Even to that other of the three united kingdoms which is contiguous to England, the contagion has not extended itself: though, on the other hand, it has crossed the sea, and involved the other kingdom, the laws of which have been drawn from an English source.

Even in England, the number of the persons thus regularly infected is so small, that were numbers the sole object, this head of preferable exclusion might seem to have scarcely a claim to notice. But when it is considered that the station here in question, limited as is the number of the occupants, is among the chief fountains from which the public morals are derived; and that in one of them in particular, sits a reverend personage, who among his official titles numbers that of *custos morum* of the nation, guardian of the public morals; the paucity of the occupants will hardly be adduced as a sufficient reason why, in this point of view, any more than in any other, the station should be passed by as an object undeserving of regard.

Had Clodius in his day paid a visit to this island, for the purpose of delivering a set of lectures on the virtue of conjugal fidelity; or had Messalina come over and purchased the site of Camden House, for the purpose of erecting upon the premises a boarding-school upon an imperial scale, for the education of young ladies; the individuality of the two characters would scarcely have passed as a reason why

their conduct in their respective situations should be passed by, as an object too inconsiderable for notice.

Between the mendacity of the advocate and that of the judge, (the scene is now confined to England), there is this difference. Among advocates, taking any given individual, the exemplification of the quality is rather matter of suspicion than proof. That a large portion of his time is thus employed, is clear beyond dispute; but it would not always be easy to say exactly what particular portion or portions; to fix upon the particular cause, or hour, or minute. In the instance of the judge, this difficulty has no place. In this shape, as well as in so many others, the fruits of his industry are upon *record*: his name is subjoined to them, and in his own hand: they are consigned to that sort of instrument which (as if to give the better effect and virtue to this its quality) is proclaimed aloud as the standard of truth: that mass of authoritative and privileged asseveration, which no other asseveration (come it from what quarter, or from whatsoever number of quarters, it may) is ever to be suffered to contradict: a mass, the matter of which, being constantly (in the greater part of it) false, is on that account to be as constantly taken for true.

To be at a loss for specimens of the exercise of this talent, would be as if an astronomer were to be at a loss to find stars in the milky way. In the selection—since for illustration's sake a specimen must be produced—in the selection lies the only difficulty. To give them all, would be to transcribe no small part of the collection of those fruits of professional indus-

try, which, in professional language, are known by the name of books of *practice*. To transcribe them on the present occasion, would be to imitate the labour of the ingenious attorney, who, on the occasion of the entry of names and baptisms on a blank leaf, took occasion to enrich the budget of evidence with an office copy of the Bible.

In the *Mariage de Figaro*, the travelled valet, speaking of England, represents cursing and swearing as the matter constituting the basis of conversation. Though matter of that sort is more abundant than a lover either of good sense or piety would wish, yet, taken in the quantity there assigned, the proposition cannot but be considered as tinctured with that exaggeration, which, being natural to the occasion, shews itself for what it is.

If, instead of that vice, he had fixed upon the vice of lying; and, instead of common conversation, upon that sort of regulated discourse in the delivery of which a man might be expected to be more particularly on his guard; and had his observation been, that in England lying constitutes the basis of judicial procedure; his remark would have contained nothing beyond the simple and altogether indisputable truth.

Supported by irresistible power, effrontery has hardened itself to such a pitch, as to affect to regard mendacity under the palliative name of fiction: mendacity in the mouth of judges, mendacity, the source of fees, as conducive, as even necessary, to justice.

Such, in that exalted station being the practice, the habitual practice; what, in point of

character and reputation, is the consequence? Just what it might naturally be expected to be: that in the scale of trustworthiness, the assertion of an English judge, writing in that character, the assertion of the guardian of English morals, stands exactly at the lowest degree conceivable. Not only is this state of things generally notorious, but it is built upon as such by the acts of the legislature: and this so truly and effectually, that it is upon the known untrustworthiness, upon the infamy, of this exalted character, that the law depends for the efficacy of its arrangements.

Among the other devices employed by the authors of the jurisprudential system for the attainment of their ends, was that of wording their notices in such manner as to convey no information: the consequence of which, actual as well as intended, was, that a man was punished and pillaged as for a contempt of the orders thus carefully kept from coming to his knowledge. The people of England having been under a course of pillage in this form for some centuries, the cries of the oppressed prevailed at length with the legislature to apply what the authors of the grievance (the persons by whose counsels the legislature, on occasions of this sort, governs itself of course, for want of being able of itself so much as to understand the language) what the authors of the grievance presented in the character of a remedy. Instead of the sham notice, which till then had been the only notice ever delivered; instead of this sham notice by itself, the instrument was in future to contain two notices. The one was and is the old sham notice, signed by

the judge; the customary heap of lies; the official discourse of the judge, whose name, in his own handwriting, conveying the assurance of its verity, was inscribed on it. The other was ~~and is a true notice~~; a notice that may be at least, and (the nature of the contents considered) commonly will be, a true one, signed by some attorney. The two notices being in point blank contradiction to one another, on what does the efficacy of the true instrument, and of the law by which it was instituted, depend?

On what but this? viz. that the word of the attorney, who, unless by accident, has the advantage of not being known, shall be taken in preference to that of the judge, whom every body knows, and who, as such, is so much better known than trusted, that he is regarded as unworthy of all credence.

The assertion thus delivered (it may perhaps be remarked) has not received the sanction of an oath. True: unless any such duty as that of veracity should be understood as comprehended in the oath of office. But what is no less true is, that the assertion is of that class, to which the reverend authors themselves ascribe a degree of trustworthiness beyond any which they will allow to an assertion from any other quarter, though backed by the sanction of an oath. Records, instruments coming authenticated from that exalted and thus commanding station,—records, of the verity of which the above specimen furnishes a correct idea, are sure to be believed: *i. e.* (though known for what they are) acted upon as if true. Depositions, assertions from all other quarters, though sanctioned upon oath, may be believed

or not: they must take their chance:—but records are infallible.

Is it the occasion, and thence the effect,—is it the occasion, or the ceremony, that makes the political mischief, the moral turpitude? Surely not the ceremony, but the occasion. If the ceremony, then suppose a mass of testimony received without the ceremony, and an innocent man convicted and life destroyed upon that ground. In this is there no mischief? In this is there no turpitude?

On the other side, take two pieces of gold coin, two guineas, each of full weight, and, under the eye of an approving judge, to change the prisoner's doom from death to transportation, let the two-and-forty-shillings'-worth of gold coin be valued by twelve jurymen, speaking upon their oaths, at nine-and-thirty shillings, and no more. Look at this, which is every day's practice, and then say whether the distinction between the occasion and the ceremony be to the conscience of an English judge either a subject of doubt, or a matter of indifference.

Thus strong is the objection in the case of the English judge: stronger than in the case of the advocate, itself a stronger case than that of the convicted perjurer.

Mendacity, it must not be forgotten, is the only shape in which improbity is here in question: extended to other shapes, the imputation would be unfounded, and, in respect of its unquestionable groundlessness, revolting.

The Lord High Chancellor, the Lord Chief Justice,—you might be every day in his company, for any number of years, without being

under any the smallest degree of apprehension on the score of your watch. Your table might be covered with plate, and not so much as a tea-spoon would be in any the smallest danger of finding its way from his hand into his pocket. In all such particulars, your assurance of probity on the part of the arbiter of the lives of unlicensed depredators might well be as entire, as, on the part of any such unlicensed depredator, your assurance of the opposite quality would.

But in regard to that particular modification of improbity which alone is here in question, the matter may be seen to stand upon a very different footing, not to say an opposite one.

It is to his celebrity and long-continued experience in the capacity of an advocate, that the Lord Chancellor or Lord Chief Justice is indebted for his commanding situation in the character of a judge.

In the case of the unlicensed depredator, mendacity is but a casual practice, an accidentally-necessary resource. For the purpose of getting your watch, no lies are told by the man whose dexterity finds means in the crowd to extract it out of your fob. For the purpose of getting your spoons, no lies are told by the burglar, to whose ingenuity the window-shutter of your butler's pantry has proved an insufficient obstacle. If, for converting these treasures into others more particularly adapted to his immediate use, it be necessary for the acquirer to have recourse to an ordinary and unconfederated dealer; true it is that in that case a story may eventually be to be told. But if, between the man of dexterity and the man of thrift, there be a regular established connexion, cemented by the neces-

sary confidence, invention has no need to draw upon itself; and though, in the shape of deprecation, improbity thus extends and doubles itself, in the shape of mendacity it finds no place.

Far different, not to say directly opposite, is the case as between the two practitioners, on the ground of mendacity. On this ground, what, on the part of the practitioner whose strength lies in his hands, was but a casualty, is, on the part of him whose strength lies in his brains and tongue, matter of regular, of constant, of necessary practice. Set the one and the other in the witness-box, the dignified practitioner will be the most careful not to hazard any false statement that would be easily open to detection; but as often as the nature of the case holds out security against detection, a natural consequence is, that of the two he shall be the more ready at the utterance of falsehood, as well as more adroit and successful in the management of it.

The field of psychological facts is a field which, in its whole extent, holds out to learned mendacity this encouraging and fostering security. Under his brush, like drapery under that of the painter, intentions, motives, disposition, character, every thing of that sort takes, on each occasion, the exact shape and hue which the occasion, and the purpose that arises out of it, requires. In equity, all facts of this class are made by the learned draughtsman; at common law, by the leading counsel. Whether of his own stores, or by adoption from the attorney, from the paper of instructions in one

case, from the brief in the other, is matter of accident, and not worth thinking about.

In all these particulars, misrepresentation, whether on the wrong or on the right side, is matter of course. On the wrong side it is matter of duty, a duty the more imperious the more perilous the wrong; and punishment, in the shape of professional dishonour and forfeiture of practice, would be the consequence of neglect: if on the right side, embellishment in this stile is, if not a duty, at least a merit, and reward, in the shape of honour, awaits the skilful and successful organ.

In the production of these cases, strong as they are, let not the purpose for which they are adduced, let not the proposition contended for, be for a moment out of sight. Even in these strongest of all cases, that of the advocate any where, and that of the judge in England, the object is not to recommend, but to reprobate, the shutting the door against the evidence. Rightly you can never act, so long as, on the ground of untrustworthiness and consequent fear of deception, you shut the door of justice against any human testimony. But if you will not act rightly, act at least consistently: and to do so, you must shut the door in the first place against yourselves. *Judico me cremari*, was the decision of Judge Blackstone's righteous Pope: take that case for your precedent, and say, *judico me excludi*: the sacrifice will not be quite so great, the decision not less reasonable. Having done with yourselves, proceed upon your learned brethren, and their ungraduated fellow-practisers the barristers of

the present time, the apprentices of the heroic age. From them descend to solicitors, and to attorneys, if any you can find, who, flying from public odium, have not taken shelter under the former, the less hackneyed name.

When the testimony of these venders of falsehood for daily bread is shut out, it will be time enough to think about shutting the door against the ill-fated Jonas, whose misfortune it was to be detected in acting, for once in his life, without a license, that part which he sees performed every day with such universal applause, and on the highest theatres, under the sanction of a license.

But, above all, forget not that most deeply-learned person, whom I was in danger to have forgotten, the special pleader: who, having never opened his mouth, has never spoken a lie; but who, from his first entrance into the profession, unto the present moment, whatever be the present moment, never knew what it was to set his hand to a single paper without a lie in it.

Let us not mistake. If the presumption of untrustworthiness do, upon any such grounds as above, attach itself with justice upon the English judge, it certainly is not upon the station; as little is it upon the nation. It is upon the system, the technical system, under which he acts: the system that causes him to be false, habitually and constantly false; and not only to be false, but to be the cause, and the constantly-acting cause, of falsehood in other men. The technical system is a hot-house of mendacity: the soil richer, far richer, in England than under any other clime. The advocate, picked out in due time from the bed of special

pleaders or chancery draughtsmen, is trained up in this stove : the judge is the advocate run to seed.

It extends not, this disastrous presumption, —it extends not, in any thing like equal force, to the judge, nor even to the advocate, of any other country : it crosses not the Tweed. Under Roman law, if, under the name of fiction, falsehood be now and then served up to the table of the judge, it is only, as it were, by way of dessert, and in the character of a casual delicacy. It is on English benches that it is gorged and disgorged, with an appetite that will bear the epithet of canine.

If it extends not, in any comparatively considerable force, to the judge, or even the advocate, in any other country, much less does it, even in England, to the country magistrate, the justice of the peace ; much less does it, in any even the slightest degree, to those unlearned judges. Never have they fed on any such foul diet : they have never shaken hands with Den or Fen, with Doe or Roe : no connexion have they with sham pledges, with sham bail, with sham any thing : fees flow not into their hands from any such polluted source.

To the general conclusion : be of this set of cases the strength what it may, it can never stand against the force of the general answer. The more manifest the mendacity, the more secure it is against the danger of producing deception ; that consequence, without which, mendacity, howsoever it be in intention, is altogether innocent in point of effect. By those from whom it issues, and who act upon it as if it were true, the mendacity of it is still more

fully understood than it can be by any body else.

After this conclusive answer, others that carry upon the face of them more or less truth, have, for the present purpose, little claim to notice. A distinction may require to be taken between the judge and the man; and as in the Court of Exchequer the same robes include two sorts of judges, a common law judge, and an equity law judge, whose vocation consists in stopping and thwarting the proceedings of the other; so in any and every court it may happen to the same envelop to contain two sorts of human beings, a veracious individual, and a perpetually-lying judge.

The remark is certainly not without foundation in experience. Not that the observation can be altogether free from regret, that between the two opposite characters the contact should be so constant and so close; that one head should encircle two such faces. The claim to competency is beyond dispute; but when credibility comes to be considered, proverbs in abundance, regarded commonly as the emanation of wisdom, the offspring of experience, obtrude themselves, and become troublesome: nor is it pleasant to consider, that the weakness of the union, in the character of an objection to what is called credibility, depends upon the truth of the proposition, that communications thus evil and thus close do not corrupt good manners.

No: it is not for the purpose of advocating, but of reprobating exclusion of testimony, that these remarkable cases are spread upon the carpet: it is not for the purpose of proving that these ought to be excluded, but that none ought

to be excluded: not only not the felon or the perjurer, nor even the ever-mendacious advocate of any country, but not even the constant arbiter, utterer, bespeaker, rewarder, and compeller of mendacity, the English judge.

No: let them not shut the door of the witness-box against any human creature: but if nothing will satisfy them but that somebody must be excluded,—if the demon of exclusion must have victims,—let judges and advocates be the first.

## CHAPTER V.

IMPROPRIETY OF EXCLUSION ON THE GROUND  
OF RELIGIOUS OPINIONS.SECT. I.—*Atheism, an improper ground of  
exclusion.*

IN the case of improbity, the seat of the disease is in the will; in the case of atheism, the seat of the disease (such let us call it) is in the understanding. Between the two branches of the mental frame, the communication is indeed most intimate: true: but they must not be confounded. Here the presumption is still more remote and slighter than before. Could the absence of all sinister interest be ascertained, improbity in the case in which the presumption it affords is the strongest, improbity in the shape of perjury, would not afford any the slightest presumption of mendacity in any given instance. Perjury *is* improbity. But atheism is not improbity: that it affords a presumption of improbity, is the utmost that can be said of it by any body.

From the four sources above mentioned under the name of *sanctions*, the ideas of pain and pleasure are found operating on each man, with more or less force, in the character of

standing tutelary motives : the physical sanction, the moral or popular, the political or legal, and the religious. The atheist is one on whom the religious sanction has no hold. In respect of the extent of the cases in which they respectively operate, the physical is confined within natural limits ; the political, by limits more or less casual and scanty : the moral and the religious, though hitherto variable, are altogether unconfined, and capable of covering the whole field. But human conduct depends not merely on the number and nature of the moral forces to the action of which, on the occasion in question, the patient is exposed, but also on the sensibility of his mental frame with reference to each such force. To restrain this man, all four shall be unavailing : to restrain that man, a single one of them shall be sufficient.

It has been seen in Book I. how much may be said in behalf of the opinion, that, in the character of a security for good conduct in the present life, the religious sanction is incomparably less efficient than either the moral or the political. If this opinion be true, it follows, that any presumption of improbity which can be afforded by atheism is very slight.

The question, however, whether in any degree, and in what degree, the absence of religion, or this or that erroneous opinion in regard to it, affords a presumption of improbity, may happily be added to the list of the questions the investigation of which is unnecessary to the present purpose. Why so? Answer: Because the fact of a man's entertaining any such opinion, is that sort of psychological fact, of the existence of which it is impossible for

the judge to obtain sufficient evidence, on any other supposition than that of a degree of veracity, not only exclusive of the supposition of a more than ordinary propensity to mendacity, but in itself so pre-eminent, as to entitle the testimony of the witness to a more than ordinary share of confidence.

To cause a man for this purpose to be justly regarded as an atheist, the evidence must come either from an extraneous source, or from discourses formerly committed to writing by himself, or from his own lips.

1. Coming from an extraneous source, the persuasive force of the evidence finds two objections to encounter it. In the first place, it is at best but hearsay evidence: on such or such an occasion he declared himself an atheist. In the next place, the time of the fact, supposing it true, is a time past and gone. For aught that appears, the situation he is in in this respect may be parallel to that of a man who at one time had an interest in the cause; but an interest which, before any occasion led him to speak of the fact, was extinct. Once that error was entertained by him: admitted: but in the existence of a God is there any thing so perfectly incredible, that when once a man has entertained the contrary persuasion, it is impossible for him ever to cease to entertain it?

2. Let the evidence be derived from former writings of his own. In this case, the first of the two above-mentioned causes of inconclusiveness has no existence; but the second remains; and with the same degree of force as in the former case.

3. Next, and lastly, let the evidence, which-

soever way it turns, come from his own lips. Being about to give his testimony, the first question put to him is, Are you an atheist? Answer, no, or yes.

First, let it be *no*. If there be no extraneous evidence to the contrary, the objection is disposed of. But suppose extraneous evidence to the contrary; viz., the hearsay evidence above spoken of. *Primâ facie*, and in general, hearsay evidence is superseded, and turned into superfluous, equivalent to irrelevant, by the immediate testimony of the person whose supposed extra-judicial discourse is reported by it. But, upon occasion, for infirmation, or even for confirmation, of the immediate and judicial testimony of the supposed extra-judicial discourser, it may still have its use. Comes then the extraneous witness to the proposed witness's character, and says of him:—on such a day I heard him declare himself an atheist. But be this statement true or false, by it the declaration of the supposed atheist, the declaration whereby he says, I am not an atheist, is not contradicted. Then, when he declared himself an atheist, he was an atheist; now that he says, I am not an atheist, he is not so. If, indeed, he says—no, on the occasion of which the witness speaks, I did not declare myself an atheist, then, indeed, contradiction exists: then it is for the judge to make his choice, and say to himself, which of them he will believe. Not that the choice is worth making; for the fact thus to be determined, is the state of the mind of the supposed atheist at that former time: whereas, the fact on which the alleged cause of the exclusion rests, is the state of his mind at the time when

called upon to give evidence. If a written document is produced, as above, the contradiction is more conclusive than in the other case; unless the meaning put upon the document, or its genuineness, or its exemption (*i. e.* the exemption of the act of writing it) from force or fraud, be contested and rendered dubious.

Next, let the answer be, Yes, I am an atheist. Then, indeed, the man must be an atheist; at any rate he must be taken for an atheist. But shall this answer be regarded as a piece of evidence warranting the exclusion? No, surely; and for this reason. The answer is either false or true. If false, the supposed cause of the exclusion fails in point of fact. He is not an atheist; he cannot, therefore, with propriety be excluded on the ground of atheism. If the answer be true, the cause of exclusion fails on another ground: the presumption of mendacity, the presumption grounded on the atheism, is proved to be erroneous.

What is known to every man, cannot be unknown to him: viz., in the first place, the general odium to which this declaration is likely to expose him: in the next place, to what a degree it cannot but diminish the degree of credence likely to be given to his evidence; *i. e.* counteract what cannot but be his own purposes, if his evidence be purposely false. On the other hand, if he says, No, I am not an atheist; the avoidance of that infamy, the preservation of his evidence from that discredit, is certain: mendacity would find the field quite clear: disproof would be impossible. What, then, to the present purpose, is the effect of such a declaration? To shew

that from the three other sanctions, one or all of them, his will (such is his relative sensibility) experiences that degree of influence, which, on the minds of so large a proportion of mankind, all four together are so frequently insufficient to produce.

Compare this case with the above-mentioned vulgar notion about interest. By that prejudice, men in general are presumed ready to give mendacious testimony by the slightest particle of interest. Here is an interest,—and that an interest corresponding to the moral sanction—an interest corresponding to the fear of shame,—urging him, and with great force, to speak falsely on this occasion, by saying that he is not an atheist, when he is. Urged by a detachment of that force (viz., the force of the moral sanction) to deviate from the path of truth; yet, such is the power of that sanction over his will, there exists still in his mind the main body of that force (for by the supposition all the other three sanctions are out of the question), acting upon him with such effect as to keep his discourse steady, and preserve him from straying into that sinister path towards which it is thus impelled.

This is no place for the discussion of opinions on the subject of religion; but one general observation belongs strictly to the present purpose. Were an atheist a worse monster than he has ever been supposed to be, bent upon doing mischief in all possible ways, on all possible occasions, and by all possible means, false testimony among the rest; a rule excluding testimony on the score of atheism would afford no security against the mischief to be

apprehended from that source: for, to get rid of the exclusion, he would have no more to do than to put himself to the expense of a falsehood, of which the detection is impossible. On the other hand, the exclusion operates, to a considerable extent, as a safeguard to all criminals, atheists or not, who, when called upon to bear testimony against one another, are willing to make profession of atheism.

Under the exclusions founded on criminality, a man has a license to commit crimes, but he will not seek it for the purpose: it would be too expensive: he must pay for it, either with his liberty (not to speak of other punishment) or with his life. Under those founded on religion, he may seek it for the purpose: he may take out the license, and take it out for almost nothing. A knot of any sort of criminals may conspire, and insure to one another impunity, so far as depends on the evidence of each other.

An atheist is a bad witness; but how to know him from another? It must be from his own account of himself, if from any thing: for atheism is not written on a man's forehead. Which, then, is the true atheist? The man who says he is not an atheist, and is one; or the man who says he is an atheist, and is not so? This pretended atheist (it should seem) must be considered as the true one, for every practical purpose. Those who speak of atheists as lying under the disabilities in question, must, if they mean any thing, mean such persons, and all such persons, as exhibit the only marks of atheism which the nature of the case can by any possibility afford. If this be true, here is

a receipt, and that an infallible one, whereby any man that pleases may render his testimony unreceivable. The conspirators in one of the assassination plots against Henry the Fourth of France, or his predecessor (I forget which), made use of the sacrament as an instrument for binding one another to mutual fidelity.\* Had they brooded over their plots under the shadow of the English common law, they might have found in atheism, or pretended atheism, a security, of rather a different nature, it must be confessed, but applicable to the same use, and of rather superior efficacy. A man might have taken ever so many sacraments, and be never the worse witness: but one good declaration of atheism, made in proper form and in proper company, will be enough to make him as bad as can be desired. When a man has been received to serve the king, if he would serve with safety, he must produce a certificate of orthodoxy, as demonstrated by taking the sacrament according to the forms of the English church. When a man proposes to join in murdering the king, if he would do the business in safety, as against his associates, he must make them furnish him with a certificate of their atheism.

Speculation, quoth somebody. No; cases of evidence excluded on account of atheism have every now and then presented themselves in practice.†

\* Thuani Historia.

† The books exhibit several cases of this sort; and from private information it has happened to me to hear of several not mentioned in any book.

[Such a case occurred only a few months ago. One of

The same strain of imbecility which gave rise to the examination on the *voire dire*, has, after suffering the question to be put, "Are you an atheist? and receiving an answer regarded as amounting to an affirmative, shut the door against the witness; and, in revenge for his veracity, administered injustice instead of justice to the party unfortunate enough to stand in need of this evidence.

Besides the offence against the dictates of reason and justice, the question thus put was repugnant to the known rules of actually existing law. In virtue of a statute still in force,\* a declaration to any such effect subjects the individual to penalties of high severity: and the rule, that no man shall, in return to any question, give an answer that can have the effect of subjecting him to any sort of penalty, is the firmly-established fruit of that mischievous superstition, the war upon which will form the business of the ensuing Part.

Question and answer together, the disclosure was such as could not but have given no slight wound to the feelings of a great majority, if not the whole, of the surrounding audience. But the wound had for its authors, not the honest and intrepid witness, but the crew of learned

Carlile's shopmen had been robbed. His evidence was refused, and justice denied to him, on the ground of what lawyers affectedly call *defect of religious principle*.—*Editor*.]

\* Since this was written (July 1806) the statute against blasphemy has been repealed: but the Lord Chancellor, (by virtue of that power of superseding the will of the legislature, which judges never hesitate to assume to themselves whenever they need it), has taken upon himself to declare, that to deny the Trinity is still an offence at common law.—*Editor*.

sophists: the attorney, who put the insinuation into the brief; the advocate, who formed a question out of it; but, above all, the judge, who suffered such a question to be put.

SECT. II. *Cacothcism, or bad religion, an improper ground of exclusion.*

How impossible it is from atheism to deduce a proper ground for exclusion, we have just been seeing. From cacothcism, though no good ground, yet a less bad ground might be made, if there were any man whose God commanded him to commit perjury; meaning always by perjury (what it were so much to be wished were always meant by it), mendacity by party or witness on a judicial occasion: oath or no oath. The Gods of the Hindoos, if the translations we have of their scriptures are in this instance to be depended upon, license such mendacity in certain cases.\*

On this, as on every other part of the ground, common law is up in arms against common sense and common honesty, and, by its inconsistencies, against itself.

The God of the Jews, and, by a prodigious and modern stretch of jurisprudential liberality, the God of the Mahometans,† and the God of the Hindoos,‡ are tolerated, as not countenancing perjury.§ The God who binds men to

\* Vide *suprà*, vol. i. p. 236. † Buller, 292. ‡ *Ib.*

§ Moreover, by a still more recent effort of liberality, a Scottish schismatic, under the name of a covenanter, has also been admitted to give evidence; although, instead of kissing the book, as a man of perfect trustworthiness would have

veracity by broken saucers\*, the God of the Chinese, if they have a god, though it has so often been said they have none, even he is tolerated: the God of the catholics and the God of quakers is not tolerated. In intendment of law, he either commands perjury, or is, at best, indifferent about it.

No; this account is not yet a correct one: were this the law, it would be reasonable, in comparison of what, when correctly stated, it will be seen to be.

1. Catholics.

Catholics excluded? those Christians, in comparison of whom, those who are not catholics compose a small minority, church of England men a still smaller? Catholics, than whom, till as it were of yesterday, there were no other Christians? Evidence of catholics excluded? Are we then commanded by law to believe that there is neither society, nor laws, nor judicature, nor evidence, nor veracity, among the greater part of Christians?†

done, he contented himself with looking at it, lifting up his right hand at the same time.

\* In the pamphlet intituled, "Trial at large of Acon, a Chinese Tartar Sailor, for murder. Tried at the Admiralty Sessions, holden at the Sessions' House, in the Old Bailey, on Friday, July 4, 1806, before Sir William Holt, knight, judge of the High Court of Admiralty, and Sir Simon Le Blanc, knight, one of the judges of the Court of King's Bench. London: Printed for, and sold by, R. Butters, 22 Fetter Lane, Fleet Street." Page 4, "The oath being repeated in the Chinese language, on the conclusion, a China saucer is presented to the person, which he holds in his right hand, and then dashes to pieces; the signification of which is, that if he does not speak the truth, may his body be dashed to pieces in the same manner as the saucer."

† Some how or other, it happens, that for two centuries there is not a case of state perjury on the black side, but

Catholics excluded? Oh! no, not all catholics: no, only those who have exhibited a degree of attachment to the duties of religion; such a degree as, among protestants, would be as rare as martyrdom is rare. A catholic, as such, is not excluded; he must be a popish recusant.\* An oath is tendered to him: an oath which

religion, and in particular the church of England religion, is at the bottom of it. The popish plot is a striking example. I am not so shallow or so violent as to conclude from this circumstance, that a man who has a religion is less trustworthy than one who has none, or that the church of England religion is a worse religion than the catholic. But one use I cannot refrain from making of these occurrences, against the incapacitation grounded on catholicism. On the church of England side, I find in history symptoms of perjury of the worst sort; and on the catholic side none. I am not so mad as to say, that whoever is a church of England man is on that account unfit to be believed; but thus much I cannot but say, that as far as the indications afforded by the history of England extend, there is more ground for excluding a church of England man than for excluding a catholic, or a man of any other sect.

\* A popish recusant (it may be said) is now become no more than an empty name. To be a popish recusant, a man must be a papist; and there are now no papists: new oaths having been devised, new oaths, which catholics, it is supposed, have no objection to take. Be it so; but then the class remains open to receive as many as may choose to enter into it. That some would remain attached to it, at least in their hearts, was the very supposition upon which the new laws were grounded. Else, what use for any new laws? else, what is there done by the new laws, that would not have been done much better by a sponge? Why leave the statute-book still encumbered with the engines (rusty as they are) of persecution and intolerance? But antipathy, blind antipathy, must have its pastime saved for it: deprived of flesh and blood, it must still have a mannikin to pummel and vent itself upon. Hogarth has painted cruelty on its progress: this is cruelty on its return. Be this as it may; on this head, so far as exclusion is concerned, whatever thanks may be due to statute law, none are due to jurisprudence.

the catholic who takes renounces his religion, denies that he is a catholic: it was devised, and avowedly, for this very purpose. Thus, then, under the spirit of this policy, a distribution is made of catholics into two classes, perjurers and non-perjurers: to all who will perjure themselves, the door of the witness-box is thrown open; against all who will not perjure themselves, it is shut.

It is with catholics, as we have seen it to be with atheists. It is not to atheists that the law is opposed; it is only to such atheists as will not perjure themselves.\*

## 2. Quakers.

What is known to every body, is that, as far

\* It is thus with oaths, on every occasion on which they are employed as tests. A line drawn with great ceremony; the population of the country divided by it into two classes. On one side of the line, all those whom the proffered seduction is unable to draw aside from the path marked out by conscience; on the other, all those in whose eyes the most solemn and deliberate assertion is an empty ceremony. On the one side, all those of whom, by the experiment, you are made sure that they will not be perjurers; on the other side, all those, of each of whom, the best that can be said is, that it cannot be known whether he be or be not a perjurer. A line drawn; and to what purpose? That every man of whom it is clear that he will not perjure himself, may be subjected to some disability, some insecurity, some dishonour: that every man, of whom it is matter of doubt whether he is or is not perjured, may be gratified with a share in some monopoly, with the possession of some privilege. In the case of such a law, who will, and who will not, be perjurers, cannot be seen till it is passed and executed; but what may be seen, and that as soon as it has been put to the vote, is, that,—in intention at any rate, and so far as depends upon themselves,—all who vote for it are suborners. Thus it is, that, with religion on their lips, men wage war against morality and human happiness. When will such warfare cease?

as any thing can be true that is predicated of men in whole classes, the quakers are the most veracious of mankind. Whatever regard men at large are wont to pay to that which they say upon oath, that, and more, is paid by this knot of friends to what is said by them (on the like serious occasions at least) without oath.

By the legislature itself, to say the least, they are not regarded as mendacious. Laws have been made, for the express purpose of giving indulgence to their weakness, and admitting them to give evidence without the ceremony. Laws made: yes: but here comes jurisprudence with its distinctions, its perplexities, and its inconsistencies. In with him, on *civil* ground: out with him, on *criminal*. Occasion there has been to say, over and over again, that, as to all criminal cases, where the punishment is not beyond pecuniary, the distinction is nominal and frivolous: since, for the self-same offence or supposed offence, for the self-same cause, a man may be proceeded against (at the option of whoever chooses to proceed against him) in the one way or the other. Accordingly, to the extent, at any rate, of this coincidence, the admitting law cannot do right but it must do wrong. It cannot do right in admitting the quaker in a civil cause, without doing wrong in excluding him when the suit chosen has been one of the criminal sort.

But suppose the punishment ultra-pecuniary: suppose man's life at stake: suppose a quaker, that is, a man calling himself a quaker, wicked enough to attempt murder with his tongue: has not the law suffering enough at its command to punish him with? In non-quakers,

law exempts from punishment murder committed with this instrument. The punishment which, in this case, is too much for a non-quaker, might not some of it be reserved for the quaker, and serve as a succedaneum to the ceremony to which he is thus recalcitrant?

Conceive a class of men, amounting to many thousands, on whose persons, male or female, and in whose presence, so there be no other witnesses, all other men are left free, have a license from the law, to commit (so they be but capital) all imaginable crimes,—rape, robbery, burglary, mayhem, incendiarism, and so forth. As to property of persons absent, destroyed or stolen in their presence,—this, with so many other trifles of the like nature, is scarce worth adding. I remember the case of a man who, in pursuit of a scheme of plunder, set a house on fire, and who, because nobody had seen what he was about but a quaker, was turned loose again to burn other houses.

Here again comes the same sort of inconsistency as was observed in the case of the atheist and the catholic. Obeying the dictates of conscience, a man remains incredible: violating them, he becomes credible.

### 3. Persons excommunicated.

You omit paying your attorney's bill: if the bill is a just one, and you able to pay it, this is wrong of you; but if unable, your lot (of which immediately) will be just the same. If the business done, was done in a court called a common law court, your attorney is called an attorney, and the case belongs not to this purpose. If in a court called an ecclesiastical court, the attorney is called a proctor: you are

imprisoned, and so forth ; but first you must be excommunicated. For this crime, or for any other, no sooner are you excommunicated, than a discovery is made, that, being "excluded out of the church," you are "not under the influence of any religion :"\* you are a sort of atheist. To your own weak reason it appears to you that you believe ; but the law, which is the perfection of reason, knows that you do not. Being omniscient, and infallible, and so forth, she knows that, were you to be heard, it would be impossible you should speak true : therefore, you too are posted off upon the excluded list, along with atheists, catholics, and quakers.

Forbidden by his religion, a quaker will not pay tithes : sued in the spiritual court, he is excommunicated. As a witness, he is now incompetent twice over : once by being a quaker, and again by being excommunicate. Why by being excommunicate ? Answer, per Mr. Justice Buller,—"because he is not under the influence of any religion."†

Of the exclusionary system, a part of the mischief (it has been already observed) not to speak of other parts, is, that it involves in it a license to persons unknown, in unknown numbers, to commit injustice in all imaginable shapes ; to commit all imaginable crimes.

To the legislator, having always an interest more or less unmixed in the well-being of the people, being always more or less governed

\* Buller, 292.

† Since these two paragraphs were written (July 1806), the incompetency of excommunicated persons to give evidence has been removed by the statute 53 G. 3, cap. 127 (Phillips, i. 26).—*Editor*.

by that interest; to the real and legitimate legislator, acting as such, it could hardly have happened, unless by sinister counsel, to give into a system so obviously hostile to the well-being of the people.

By the judge, acting under the fee-collecting system, and under the sinister impulse given to him by that system,—by the judge wielding in disguise the sceptre of legislation, public interest would, at best, and where not exposed to an eye of positive hostility, be regarded, of course, with indifference. When lawyer's profit (the only serious object of his care) had mischief (in whatever shape,—expense, delay, vexation, misdecision, failure of justice) for its immediate cause, or (what comes to the same thing) its inseparable, though but collateral, accompaniment; mischief would be the fruit of his choice: and hence, it was by the exclusion of the presence, and thence of the testimony, of the parties, that the foundation of the exclusionary system, that grand support of the fee-collecting system, was laid. When the above-described connexion between lawyer's profit and non-lawyer's misery either did not exist, or did not present itself to his view; then it was that, every now and then, it would happen to him to produce mischief and misery, not purposely, not with malice prepense, but only, as the clown in Dryden's legend whistled, for want of thought.

In the present case, it would appear, that so wide a deviation from the line of utility and justice was mainly occasioned by the sentiment of antipathy.

Although punishment admits of no other jus-

tificative reason, than a probable prospect of the production of greater good,—of an increase in the aggregate mass of happiness, of a decrease in the aggregate mass of misery; yet such has rarely been the final cause of punishment in the mind of the legislator: especially in those times of primeval barbarism, in which all systems of legislation have had their rise. Diminution of suffering (viz. on the part of the community injured by the offence) may have been, in any given instance, the *result* and *fruit* of punishment; but, even where this is the case, not diminution, but production, of suffering—viz. on the part of the offender,—has but too often, and perhaps in the origin of society most commonly, been at least the predominant, if not the sole, *object* and *end* in view. By the view of such or such a mode of conduct, the feeling of antipathy has been excited in the breast of the man in power: to gratify it, he sets himself to work to plague and torment the individual by whom that unpleasant sensation has been excited: by the spectacle of the suffering so produced, the appetite receives its gratification. At the same time, the same spectacle, exhibiting itself to the eyes or the imagination of those who, were it not for the punishment, might have engaged in the practice of acts of the same sort as the act thus punished, restrains them, to a certain degree, from the thus forbidden practice, and causes acts of that description to be less frequent than they would be. If the mode of conduct whereby the antipathy has been produced be of the number of those, the consequences of which have more of evil in them than of good,

the restraint thus produced is beneficial to the community. It is not the less beneficial to the community, for not having been present, in idea, to the mind of the man in power: but neither, on the other hand, from its having been the eventual result of the use he has thus been making of his power, does it follow, by any means, that the idea of it was previously present to his mind. If it had been uniformly present to his mind,—if the benefit to the community had been the ultimate object of his exertions,—if the suffering of the obnoxious person had, instead of being the ultimate object, been no more than the means, the mediatory object; the quantum of suffering would have been measured out according to the object, would have been suited to it in quality, would have been adjusted to it in quantity, and would not any where have overshoot the mark: not a particle of suffering would have been produced, of which the effects had not previously been fully comprehended and accurately ascertained. Of any such accuracy, however,—of any such calm and exclusively-appropriated attention to the aggregate interest of the community, and the ends of public justice, the very idea is new: even at the present advanced period in the career of perfectibility and civilization. Much more must the practice have been generally unknown, in those rude times in which the art of legislation was in its cradle; in those times of infantine ignorance, which are still suffered to rule the destiny of riper age. In this temper of mind, among men whose minds were engrossed by these narrow views, no wonder that any vehicle or mass of mischief, which promised

to add any thing to the plague, should be snatched up and hurled at the head of the obnoxious offender, with little knowledge of, and as little solicitude about, the contents: laid hold of, and eagerly employed, not only without staying to investigate the consequences, present and future, near and remote, certain and contingent, with reference to the obnoxious individual,—but with as little attention to any effects of which it might be productive on the feelings of other individuals, connected by accident only with the individual by whose offence the passion had been excited; individuals whose suffering, had it been included in the prospect, was not of a nature to contribute any thing to the gratification aimed at.

Antipathy, when its exertions are regulated by utility and justice, is the handmaid of justice. Antipathy towards the injurer is the natural, and in a human bosom in some degree even the inseparable, consequence of sympathy for the injured.

Unhappily for mankind, the antipathy thus directed has not been most energetic or most busy when the object to which it pointed was the most noxious. They who have diminished the sum of human enjoyment, they who have augmented the sum of human suffering, these find antipathy, sooner or later, not averse to repose: they whose opinions are not our opinions, they whose pleasures are not our pleasures, they whom we oppress, they whom we exclude from their share of common benefits,—these are they who find antipathy implacable. Wherever the praise of virtue is to be earned without the expense of self-denial,

the most vicious will never be found the most backward in the chase.

Against the perjurer, his kinsman the forger, and the motley fellowship of felons, without staying to distinguish one from another, the door was shut, as it were in a pet, and "for want of thought." The precedent once made, the opportunity of stigmatizing and plaguing the traitor and the atheist, with his kinsmen, the catholic, the quaker, and the excommunicate, was not to be lost. Always remembered, that the more unforeseen exclusions there are, and the more unforeseen exceptions to exclusions, the more arguments; and the more arguments, the more fees.

The outlandish men, the Mahometan, the Hindoo, and the Chinese, against whom the door, if ever shut, has been opened, are almost as far from us as the atheist, and much farther than the catholic or the quaker. But the distance of the outlandish man is his protection. Blind from birth to the lights by which we are illuminated, he is not a rebel to the examples or the arguments, logical or golden, by which we are governed. Nuisances, it is true, all pagans are; but happily, in their case (unless now and then by accident), the nuisance is at a distance from the nose.\*

\* As to the Chinese, they have so evil a reputation, and look so much like atheists, that, had the *sine qua non* of eternal justice not been wanting, the breaking of the saucer might have been followed by an examination on the *voire dire* (*suprà*, p. 71); and the religion or irreligion of China might have been settled, in some way or other, to the satisfaction of English sages. But Acon was poor, and Acon had no advocate. On this occasion, as on others, homicide being proved, murder was presumed.

## CHAPTER VI.

IMPROPRIETY OF EXCLUSION ON THE GROUND  
OF MENTAL IMBECILITY, AND PARTICULARLY  
OF INFANCY AND SUPERANNUATION.

THE last ground of exclusion on the score of deception, to which our consideration is called, is imbecility.

From whichever source it be derived, the propriety of regarding imbecility, upon occasion, as a cause of *suspicion*, is obvious and indisputable. From whichever source derived, the taking it for a cause of *exclusion* will be found equally indefensible.

Mental or corporeal; imbecility, a term of relation, admits of degrees *ad infinitum*. Imbecility, in a variety of respects, is the lot of all created beings. Supposing that, in any degree, imbecility were capable of constituting a proper ground of exclusion, by what mark could that degree be distinguished from any other? From the impossibility of finding an answer to that question, results the impropriety of taking it for a ground of exclusion in any case. In the absence of any universal mark of such a degree of imbecility; to form such opinion as the nature of the case admits of, there is but one rational

course, which is, the examining of the proposed witness: which only rational course is the very course that, upon the supposition of the exclusion, is not suffered to be taken.

Infancy, superannuation, insanity: whatever be the modification,—connected or unconnected with the circumstance of age,—the answer will be still the same.

Between infancy and maturity, it is necessary, for some purposes, to draw a line at a venture; and that line (notwithstanding the wide difference in respect of intellectual strength between individual and individual at the same age),—that line a common one, fixed for every individual at the same place. But, to the present purpose, no such line is necessary: no such line can afford any security against deception: no such line can fail of producing, if not deception itself, yet (what is worse) misdecision.

In the case of superannuation, the impracticability of drawing any line for that purpose, without the most palpable absurdity, is plainly obvious. Imbecility, and to such a degree as to make delivery of testimony not merely ineligible but impossible, is the effect of infancy at a certain age. Imbecility, to this purpose, or indeed almost any other, considered as the result of superannuation, is but an accidental concomitant, and indeed a rare one, at any period of old age.

In the case of insanity, a fixed point of time for this purpose is not incapable of being proposed, but incapable of being employed to any good effect: when (for example) a man, having by competent authority been deemed incapable

of retaining in his own hands the management of his own affairs, without preponderant prejudice to himself and others, has by competent authority been declared in that state, and placed under the authority of a guardian for that purpose.

Here indeed would be a point of time fixed ; but no line could be drawn through it, applicable with any advantage to this purpose. From any degree of comparative unfitness in respect of providence, and the various other faculties necessary to the management of the variety of affairs that occur in human life, no tolerably-assured inference can be drawn respecting the capacity or incapacity of giving a correct and intelligible statement of a single fact which came within the cognizance of a man's senses. Before the arrangement made, a man may have been completely incapable perhaps of obtaining perception of the fact, perhaps of remembering and giving a correct and intelligible statement of such perception, though obtained :—after the arrangement, competent or incompetent to the general management of his own affairs, to the purpose of delivering testimony it may happen to him to be as completely competent as another man. These observations are brought to view for the purpose of nipping in the bud, if possible, future contingent exclusions on this ground.

Of the three sources and modifications of intellectual imbecility, infancy is the only one that has been taken for exclusion by English law. Accordingly, of the three words mentioned in this view, infancy is the only one, of which, for this purpose, any mention is to be

found in the books. For the same reason, *imbecility*, the word here employed for the purpose of including the three cases, and bringing to view the ground they stand upon, is in these treasures of technical science equally unknown.

In a direct way, infancy cannot at present be employed as a bar to admission, howsoever immature the age. For, with the approbation of the twelve judges, in the case of an infant of no more than seven years old,\* and in a case of an infant under seven years old† (how much under is not said), this evidence was received.

Unfortunately, to the admission given in this case, two conditions precedent have been annexed.

One is, that the child shall have taken an oath; *i. e.* gone through the same ceremony by which testimonial relation is preceded in other instances. To this operation, had it been performed, there could have been no objection. The misfortune was, that in a certain instance it was omitted: and the consequence was, that, a rape having been committed "on the body of " an infant under seven years of age," the man by whom, if by any body, the mischief was done, was sent out to commit other rapes.

"The prisoner" (according to the learned reporter‡) was convicted; but the judgment was respited; on a doubt (not having any relation to the fact, but) "created by a marginal " note to a case in Dyer's Reports; for these

\* Leach, ii. 482. White's case, *notes*.

† Gwillem's Bacon, ii. 577. Leach's Crown Cases, i. 237. Brazier's case.

‡ Leach, i. 237.

"notes having been made by Lord Chief Justice Treby, are considered" (continues the book) "of great weight and authority: and "it was submitted" (by Mr. Justice Buller, 22nd 1778) "to the twelve judges, whether "evidence, under any circumstances whatever, "could be legally admitted in a criminal prosecution, except upon oath?" Answer, no, not in any case.

2. The other condition was and is, that the "infant appear, on strict examination by the "court, to possess a sufficient *knowledge* of the "nature and consequences of an oath,"—"of "the *danger* and impiety of falsehood."\* For a more particular description of the *knowledge* and the *danger* above spoken of in general terms, the following exemplification promises to serve as well as any other that could be substituted to it, since neither the questions nor the answers are fixed by law. Extract from the newspaper called the *Times*, dated 17th September, 1803. Proceedings at the "Old Bailey, Friday, September 16, 1803. Mary Ann Carney, a "daughter of the prisoner, only twelve years "of age, was examined relative to the idea "she entertained of an oath, and the consequences that would result from telling a falsehood. The answer which she returned "was *exceedingly correct*: viz. that if she told "a falsehood when on oath, she should be put "in the pillory when in this world, and go to "the devil when in the next."

To the putting of a question to the effect

\* Leach, i. 238.

above described, I know of no conclusive objection; but to the deducing, either from silence or from any answer whatsoever which may have been extracted by such a question, a decision pronouncing the exclusion of the testimony, objections occur that seem perfectly unanswerable.

It is requiring of the child, as a condition precedent to her being suffered to give a sort of relation which a child of any age that can speak may be perfectly competent to give, a sort of account which a child of that immature age (to go no farther) seems altogether incompetent to give. The testimony to the relevant point is to a fact of the most simple nature,—a fact which, supposing it to have happened, must have presented itself to the senses of the patient, and made a very deep impression on them. The subject-matter of the testimony to the irrelevant point, is a fact of the most complex and abstruse nature: a fact that has been matter of dispute among the maturest, the strongest, and acutest minds.

The relevant question,—the question to which (if to any) the child would have been competent to give an answer,—was, what she had seen and felt? The irrelevant question prefixed, and (in one event) substituted to it, included a string of questions: what on this most abstruse subject she had been taught, what she had comprehended, and what she had retained? The evidence, the only evidence that, in answer to such an examination, could have been given by such a child, was, not the opinion of the child, but an article of hearsay evidence:

the account given by the child of the instruction it had received.\*

Observe the effect of the criterion so unhappily employed. The proper question, whether the child has been thus injured, is put aside; and, instead of it, another question is put in, viz. whether the child can say its catechism.

Of the substitution thus made, or preference thus given, of a question foreign to the merits, to the only question belonging to the merits, the following present themselves as the natural consequences.

1. In some cases, excluding good and true evidence; thus excluding justice, and giving impunity to the guilty. If the child has not been tutored in the requisite manner, and that with effect on the part of the child, as well as diligence on the part of the instructors, the

\* In relation to the principal point, at one time the practice was, instead of examining the child itself, to examine the parents or other persons as to the account which, immediately after the transaction, had been given by the child to them. To this sort of evidence, the examination of the child itself in court was afterwards added or substituted: if added, with indisputable propriety; not so, if substituted, to the absolute exclusion of the hearsay evidence: since, for infirmation or confirmation of evidence, the occasional use of hearsay evidence is not only indisputable, but recognized in practice. In regard to the principal fact, the reason assigned for the preference thus given to the evidence of the child itself, was, that that of the parents, &c. was but hearsay evidence. In regard to the incidental fact (the instruction given to the child), the same consideration might have suggested the propriety of examining the parents themselves in preference: the account of what instruction they had given to the child, would come from their lips in the shape of immediate evidence; from the lips of the child, the only shape in which it could come would be that of hearsay evidence.

child may have been abused and mangled, the malefactor goes unpunished, laughing at the sages from whose zeal, so little according to knowledge, he has obtained a license.

2. Placing the fate of the cause (in a capital cause, the life of the prisoner) in a state of complete dependence on the will and pleasure of the person or persons under whose power the child is all the time; its parents, for example. Is it their wish that the cause should be deprived of the benefit of the child's evidence? The catechism is omitted to be administered, or a sort of anti-catechism administered in the room of it, according to the nature of the case. By a false answer, had the testimony been admitted, the child might have been subjected to punishment as for perjury, and the parents to legal punishment, or at least to disrepute, as for subornation of perjury. On the occasion of the preliminary examination, neither from silence nor from any answer whatsoever, from any such answer as in this view they may have presented, need any such consequences be apprehended. Thus it is, that in this way the full benefit of perjury, or subornation of perjury, may be obtained, without any of the risk: the full benefit of perjury, under the protection, and as a fruit of the wisdom, of English jurisprudence.

3. Holding out to false and mendacious accusation a receipt for fabricating evidence, and, by a false gloss, bestowing on it an appearance of trustworthiness. The supposition that the individual whose fate depends upon his knowledge of the law, should on any occasion be in possession of any such knowledge, may be apt

to appear ridiculous; but it is what by accident does now and then happen. The mother of such a child forms a scheme for ruining a male enemy. She employs the requisite time and labour in impressing upon the mind of the child two lessons; the one, a false story of the supposed injury; the other, an appropriate catechism, such as may afford the requisite satisfaction to the pious anxiety of the judge. Delighted with the advances made by the sweet child in the science of theology, to entertain a doubt of its veracity would be impiety in the eyes of jurisprudential science.

The same artificial mark of trustworthiness, which, on the occasion just spoken of, gave such complete satisfaction in the instance of a child of twelve years old, might, in many instances, be imprinted with equal facility and success upon the testimony of a child not above half, or even a third of that age. It might even be imprinted upon the faculties, mental and vocal, of a naturally-accomplished and well-instructed parrot or magpie; with this difference, that, in the case of the unfeathered witness, the questions would require to be in that form to which an advocate is confined when examining a witness of his own side; whereas, in the case of the feathered witness, they would require to be in that more commodious form, with the use of which he is indulged in the examination of a witness on the opposite side.

4. The wording of the test being moreover unfixed, as is the case with every thing that has no more determinate foundation to rest upon than that of jurisprudential law; the testimony of the most trustworthy witness is liable

to be sunk by any failure of coincidence between the persuasion of the judge and the persuasion of the child (that is, of its instructors) on a subject thus obscure and delicate. Not to mention extreme cases, such as those of atheists and other unbelievers; Christians are not wanting, to whose conceptions the devil presents himself in the character of an allegorical and purely ideal personage. If, in the case of the child whose answers on this head gave such complete satisfaction at the Old Bailey, the expectation of an eventual visit to the president of the infernal regions was regarded as an article of faith indispensable to the present purpose; an answer disaffirming the existence of that tremendous personage, might have been fatal to the merits of the cause. On this supposition, a boy of twelve years, whose good fortune it had been in other respects to have been under the tuition of Dr. Priestley, or any other equally zealous defender of the Christian faith, might, for want of the necessary protection depending upon his own evidence, find himself exposed to the most afflictive personal injuries; or, at the expense of real mendacity, find himself obliged to purchase the factitious reputation of the opposite virtue.

Learned judges have seldom time to introduce any very searching probe into the bowels of the evidence: give them a good round answer, satisfaction enters, and ejects diffidence. "I shall be put into the pillory in this world; "I shall go to the devil in the next." "Exceedingly correct," is the observation of the reporter; "exceedingly correct" (unless the

reporter were incorrect),—"exceedingly correct," or something to that or the like purport or effect, must have been the observation of the judge.

In the individual cases in question, the parties on both sides being low people, (for of the labours of counsel on their behalf nothing is said); the answer, being thus pointed or rounded, and adapted to the taste of learned judges, passed without further scrutiny. His reverend lordship was not less indulgent to the young theologian, than a friendly examiner at Oxford or Cambridge would have been to a candidate for a degree in divinity, or a friendly chaplain at Lambeth to a candidate for holy orders. But suppose this preliminary examination conducted by the tongue of a well-feed advocate: alas! what would all the science of the tender student avail against the sharpness of so penetrating a probe! Conceive a Garrow opposed to the tender novice: how little would it cost him to drag to light either some jeofail in her creed, or the confession of a fact which, in the case of her making a tolerable *prima facie* answer, could never be otherwise than true, viz. that she had been tutored for the purpose.

By considerations of the above, or some other nature, (that is to say, by some of them), an impression appears to have been made on reverend minds. Mr. Justice Rooke,\* in the case of an unsatisfactory response, adjourned the cause, and committed the young witness to the charge of a clergyman, for religious instruction,

\* Gwillem's Bacon, ii. 577.

in the mean time. This *succedaneum* to exclusion obtained the approbation of the other judges.

To the impressing upon the memory the lesson to be given by the reverend divine, six months' interval between circuit and circuit was, if diligently employed, extremely well adapted: it would have been equally well adapted to the rendering the fair and tender reporter more and more perfect in any fabricated story of an injury, supposing no injury to have been sustained. But, on the opposite supposition, for the keeping alive in the infant memory a correct recollection of the transaction in its true and proper colours, the disservice that could not but be done by this long interval presents itself as equally indisputable. In this point of view, an expedient, of the sincerity of which, in its design, it is impossible to entertain a doubt, presents itself as being, in its tendency, extremely well adapted to every purpose of falsehood and injustice, and equally ill adapted to every purpose of truth and justice.

The case is unhappily of no unfrequent recurrence. Justice is wanted for it, if for any case. It is with this as with most other points of procedure: the difficulties it is encumbered with, are chiefly, if not wholly, the work of artifice and science. In itself it presents little difficulty. If mendacity were apprehended, who would not rather have to encounter a raw and juvenile prevaricator, than a reflecting veteran, with length of experience and maturity of age?

Where evidence is concerned, the duty of

learned judges (such has ever hitherto been the case) forbade them to do justice. Their duty is to preserve existing rules : and existing rules were made that justice might not be done. In a case of this sort,—where evidence of this description was a chief ingredient in the composition of the mass of evidence,—if it were lawful to discover truth, truth might be discovered with at least as much facility and certainty as in the case of ordinary evidence. The fact, if there be any thing serious in it, is established by *real* evidence ; by the physical and physiological marks of violence. Here we see one of the perpetually-recurring cases, in which all doubt might so easily be removed, one way or the other, by the examination of the defendant. The examination of the child being taken out of the hearing of its parents, on the one hand, of the defendant on the other,—that of the defendant out of the hearing of both ; the light of truth could scarce fail to issue from the collision of the evidence.

Where immaturity of age does not exist in any such degree as to deprive the child of the several degrees of the respective faculties concerned (perception, judgment, memory, and expression) that are respectively necessary to bestow on the testimony the indispensable degree of correctness ; the want of the faculties necessary to the execution of a successful plan of mendacity, gives to such immature testimony, in a very material respect, the advantage of the maturest evidence.

In the immature and tender mind, if the influence of the moral and religious sanctions is apt to be weak, unsteady, and precarious, the

mendacity-restraining influence of the physical sanction is stronger then than afterwards. Of memory, if deeply impressed and vigorous (as, in the sort of case in question, when taken fresh, it can hardly fail to be), the expression is delivered without effort. Invention, under the perpetual condition of not being true, and yet appearing to be true, is the work of anxious and unremitting labour: the less the mind is exercised in the habit of reflection, the more apt will it be to sink under the trial.

By the power of the political sanction, concentrated in this case in all its plenitude in the hands of the domestic ruler, the will of the patient might be acted upon (it is true) with a mendacity-promoting force superior to any that may be expected to bear upon the patient in an adult state, in a state of comparative independence. In few adult minds is any other fear so strongly impressed, as the fear of the rod is, in general, capable of being impressed on the infant mind, by a severe and steady hand. But the disadvantage to which, in this case, the interests of truth and justice are subjected by the weakness of the volitional faculty, may be expected to be at least compensated for by the weakness of the intellectual faculty. The child strives to lie as well as it is able; but under the opposing force of cross-examination, it is unable to lie with effect.\*

\* From the Asiatic Annual Register for 1802, pp. 132-144. Indictment for murder: Rutney, a boy of seven years old, brought forward by the prosecutors to give evidence against the prisoners, one of them his own mother (p. 138). To the preliminary examination, nothing could be more satisfactory than his answers. "He seemed completely aware of the

This much in regard to the case of infancy, which is (as already observed) the only case of imbecility which has been taken for a ground of exclusion by English law.

A case, however, presented itself not many years ago, in which a witness was rejected, not indeed on account of imbecility, but on the analogous ground of a supposed deficiency of appropriate knowledge.

Indictment of a woman for bigamy. *Rex v. Eleanor Whetford*, Guildford Assizes, Saturday, 9th August 1806, before the Lord Chief Baron. (*Times* and *Morning Chronicle*, 11th August, both in the same words.) The first marriage, or

guilt of telling a lie: and distinguished the punishment due to simple falsehood and to falsehood upon oath, by saying, that a person guilty of the one deserved to be flogged, but that those who were guilty of the other ought to be hanged. His general notions of right and wrong were equally correct, and all his answers were given in the most firm and undaunted manner.

“ Having gone through this preliminary probation, he was sworn in the usual manner; but it very soon appeared that not one word of truth was to be expected from any part of his narrative. Fortunately, the story which he told was, in itself, so inconceivable, as to carry its own refutation along with it.”

Thus far the report. The jurisdiction of the Christian devil not being recognized among the Hindoos, the theological, or diabolical part (shall we say), of the test, it may be observed, was not applied. *Deserve* and *ought* are the terms employed: terms of ambiguous import, importing obligation, but not specifying the source. Of the three sanctions, the religious, the political, and the moral, the latter only seems, on that occasion, to have been brought into action upon this eastern theatre. A test thus imperfect,—a test not containing any theological elements in its composition, could not easily have been employed in the laboratory of English jurisprudence.

supposed marriage, the parties both English, at Gretna Green, in Scotland. The celebration of the ceremony, in the manner usual in Gretna Green marriages, proved by the habitual operator, the vice-priest, a tobacconist. "David Laing, the Gretna Green parson, was first called. He stated that he performed the ceremony over the prisoner and her husband, in his way; that was, he read nothing, but he said something off the tongue, and authorised them to cohabit together."

The Lord Chief Baron said he would not admit this as a marriage. He asked him what he was. He replied, a tobacconist. His lordship observed, that a fellow or two, like the witness, did these sort of things; but both himself and the parties were liable to punishment.

Here then the fact was out of dispute: the guilt, in a moral view, (to say nothing of the religious) equally out of dispute: yet the judge acquits the prisoner, acquits her for evermore. Why? Because the state of the law, in respect of the validity of the marriage, was not, according to the conception of the learned judge, proved by a proper sort of person. "He would not receive the law of Scotland from a tobacconist." What? nor yet from any body else? That "both the fellow and the parties were liable to punishment," so much his lordship knew. So much he knew: but exactly at that point stopped his lordship's knowledge: and, what is more, exactly at that point commenced his determination not to know.

By a special verdict, (not to mention other means in use), he might have been informed: and by the same regular course, information of

no slight importance to the whole country might have been gained.

In the case quoted above out of Gwillem,\* a step altogether out of the regular course was taken. The evidence appeared not sufficient for conviction: what was the regular consequence? that the prisoner should be acquitted. Instead of that, the trial is put off to the next assizes: the defendant, guilty or innocent, in prison all the time. The proceeding was reported to the twelve judges: it was approved by them: it was therefore legal. Of these twelve reverend and learned persons, the Lord Chief Baron himself was one. Had he thought of this when trying Eleanor Whetford, he would have learnt that there are middle courses between instant conviction and instant acquittal, if the learned judge thinks proper to employ them.

Delay, and of the same length, in the one case created, in the other case not created. When created, to what end? That an infant, under seven years of age, might, at the option of its parents, be instructed in theology, or in mendacity, or in both; while the memory of the supposed fact had, if real, all that time to fade in. When refused to be created, what were the circumstances under which the omission took place? When the point that might have been aimed at by the delay would have been accomplished by it with the utmost certainty: accomplished to the satisfaction, not only of the public at large, but of the learned judge himself: for (says he) "if you have any advocate of character, I will

\* Vide *suprà*, p. 156.

"receive his testimony." Was there, in the opinion of the learned judge, any such universal perversity at the Scotch bar, as that no advocate of character would be to be found, who, in relation to this point of Scottish law, would be to be prevailed upon to give his opinion (to the present purpose called his "*testimony*") for his fee?

In the former case, the defendant was "a fellow that did those sort of things:" in the Guildford case, "the defendant was a young lady of handsome person and elegant manners; and her appearance at the bar excited considerable sympathy on her behalf in the spectators in court."

Why mention this circumstance? I mention it in addition to what has already been said on that subject in another place; that it may be seen so much the more distinctly, how easy it is, under the existing system, for a judge, in meting out justice, to have two measures; one for "fellows," another for "young ladies of handsome person and elegant manners:" and with what unhappy success, power, in reality arbitrary, has been covered up from observation by technical forms.

By the description of the person of the defendant in the Guildford case, the recollection of the classical reader is naturally sent back a few thousand years, to the incident which, in all subsequent causes, involved the proceedings of the court of Areopagus in habitual darkness. Of course, "the handsome person and elegant manners" of defendant Eleanor Whetford cannot possibly have exercised on the decision at Guildford any such influence as, in

the case of *Rex v. Phryne*, proved so salutary to the defendant Phryne, and so fatal to justice, under Athenian judicature.\* Concerning living judges, where any thing of moral blame would attach, fiction herself is silent: but, as over departed ones, history, so, over future contingent ones, fiction at any rate, maintains an undisputed power. Availing myself, then, on the present occasion, of the right of fiction (for, abhorring it as exercised for any purpose of judicature, I have not the least objection to it for the purpose of argument), the use I make of it is this; viz. that, under the law of England as it now stands (viz. in virtue of the features above described in it), an English judge is at least as much at liberty as the judge of any other country, in pronouncing his decisions, to consult (not to speak of his pocket) his party, his humour, or his taste; and that, on condition of looking grave all the time, and pronouncing certain combinations of learned words, such as never can be wanting, he will find no more difficulty in acquitting beauties than in brow-beating fellows. Not but that, so far as concerns the bare possession of the *jus nocendi*, truth might serve a man for predicating it of all alike, the living and the dead: it is only when the faculty is to be spoken of as being in actual exercise, that truth will decline to serve you, recommending it to you to employ fiction in her stead.

\* Potter's Grecian Antiquities, i. 105. Lucian in Cataplo.

## CHAPTER VII.

### OF THE RESTORATIVES FOR COMPETENCY, DEvised BY ENGLISH LAWYERS.

If, directed to no other end than the avoidance of deception, exclusion of evidence is bad altogether, bad to the whole of its extent; whatever does any thing towards the narrowing that extent, is so far good. Such being the effect of the restorative processes now to be considered, the application of them is so far good.

Here, then, it might seem at first sight that they ought to be dismissed: referring to the books for an account of them, instead of seeking to augment the load of this work by superfluous matter.

In two points of view, however, it may be not altogether useless to bestow upon them a further glance.

One is, the proof they afford (if any further proof can be wanting) of the impropriety of the rule, of which, in proportion to their extent, they destroy the efficacy. For in scarce any instance can the propriety of them be defended, but by arguments which prove or assume the impropriety of the rule. The other is, the poison they keep infusing into so commanding

a portion of the public mind : the imbecility, or improbity, or both, which, on the part of the class of minds by which such conceits have been hatched, they presuppose, and tend to perpetuate. The laws about witchcraft were in their day copious and tremendous sources of injustice : the opposite conceit about *exorcism* might so far have its use, if, in here and there an instance, it served to snatch a victim from the other prejudice, or in any other way to narrow the channel of injustice. But, forasmuch as this quack remedy served to confirm in men's minds the opinion of the existence of the disease, and thence to give extent and permanency to an opinion which is in itself a most cruel disease, the effect of it was, perhaps, rather pernicious than beneficial upon the whole. What exorcism has been to sorcery and witchcraft, the restorative processes here about to be brought to view still are, in relation to the practice of treating evidence as if it were bewitched, and thence unfit for use.

In a system of law, absurdity, even although no immediate practical consequences are deduced from it, is never a matter of indifference : for whatever is found so exalted is venerated, and whatever is venerated is imitated.

To keep up in the composition of the legal system as large a proportion of absurdity as the stomach of the people can be made to endure, is among the deepest and the most favourite arts of lawyercraft : the security of the impostor is in proportion to the stupidity of the dupe. What renders the device the better adapted to its purpose is, that in the situation

in which the lawyer acts, the most stupid and the most acute find equal facility in the practice of it. To adorn a spot with a palace, or strengthen it with a fortress, demands the skill of the architect or the engineer; but to encumber it with rubbish, is an operation to which the rudest hands are competent, especially if stationed on the heights above.

If what follows in this chapter should appear to resemble a sick man's dream, rather than a work of reflection,—should exhibit all the wildness of the Arabian Nights, without any of the beauty; pardon, gentle reader: such as I have it, give I it unto thee. By me, it has not any of it been made: all that I have done by it, is to present it in its native colours, after stripping it of the mask of sapience in which lawyercraft and bigotry had dressed it up.

The theory of trustworthiness, untrustworthiness, and restoration of trustworthiness, of health, disease, and mode of cure, so far as concerns the branch of the pathologico-psychological system here in question, has revealed itself here and there, in unconnected rudiments and fragments, to the sagacity of English lawyers. But, with shame be it spoken, never yet was it formed into a complete and consistent whole; never was this interesting branch of the science of evidence placed upon its proper basis, till the genius of Dr. Gall arose, and dazzled with its effulgence the eyes of astonished Europe. By the discoveries of that great man, we are at length enabled to understand what English lawyers have been at.

The faculty of delivering true testimony, depends (like all other faculties, moral and intel-

lectual) upon a particular organ which is the seat of it: a portion or protuberance of the human cranium, which may be called the organ of trustworthiness. Near this precious organ (alas! too near it) are stationed the organs of *interest* and *improbability*, two of the principal organs of untrustworthiness. When the appropriate exciting matter correspondent to either of these respective organs applies itself to the system, the organ of untrustworthiness dilates, extends itself, and by its overbearing influence depresses the organ of trustworthiness: on the other hand, no sooner is the appropriate and correspondent instrument of restoration taken in hand, and applied *secundum artem*, than the tumidity antecedently superinduced upon the organ of untrustworthiness subsides, and the organ of trustworthiness (like a giant refreshed) rises and reassumes its native strength and stature.

Antecedently to this theory, by which all difficulties are now at length cleared up, the ingenuity of English sages had discovered (though by a method not wholly clear of the imputation of empiricism) divers remedies, which, acting upon the peccant and œdematous matter of the organs of untrustworthiness, operate upon the organ of trustworthiness in the character of *restoratives*.

The annals of psychology afford a case of an unhappy gentleman, a Mr. Simon Browne, whose misfortune it was one day to feel his immortal soul perish within him.\* For a species of mortification so fatal in its extent, the

\* Hawksworth's Adventurer.

pharmacopœia of that day at least, seems not to have furnished any remedy. Had the disease been confined to that part of the soul which is the seat of veracity, the case would not have been thus desperate. For the restitution of the organ of trustworthiness, Westminster Hall affords no fewer than five specifics. Four of these are drawn from the mechanical school, and consist in the scientific application of four several instruments: a burning iron, a small seal, a great seal, and a sort of lever called a sceptre. Of the fifth, the appropriate instrument is a tongue.

When the peccant matter acts in the shape of interest, the small seal will suffice: when it is of the nature of improbity, nothing less than the great seal will serve. The sceptre is applied to the same purposes as the great seal; but the scale it acts upon is larger, and indeed indefinite. By the great seal, improbity is discharged in a small stream, as it were by a hand-pump, and from only one bosom at a time: by the sceptre it is discharged as from a pump worked like that at the royal dock-yard at Portsmouth, by a steam-engine. The number of bosoms capable of being thus cleared by it, and by a single stroke, is absolutely without limit.

1. *Burning Iron.* In the character of a restorative of competency when impaired by improbity, the use of this instrument is confined to felonies, and among those to clergyable felonies. The iron, being made red hot, is applied to the hand: there must be a hissing and an outcry; but of each, any the least degree is suf-

ficient: the outcry must be performed either by the prisoner or a lawful deputy: the hissing may be performed by a piece of bacon. In this case, the *modus operandi* of the remedy is so obvious, it is almost superfluous to mention it: the virus is burnt out by the actual cautery, exactly like the virus of a mad dog: the organ of untrustworthiness collapses, and its antagonist resumes its post.

Some how or other, this remedy has of late years grown out of fashion. Instead of undergoing the operation of the cautery, the patient is sent to breathe the air of New South Wales. Whether the competency of such of the sojourners there on whose evidence others of them have been hanged, was previously restored or no, is not as yet known, the question not having been yet laid before the twelve judges. If yes, it must have been by the air of the place, known as it is to be in other respects remarkably salubrious.

The action of this restorative depends upon a variety of circumstances, some of them not immediately obvious to any but learned eyes. The difference (for example) between a felony clergyable and ditto unclergyable, turns upon a farthing: if the value of the article stolen, being really 40s., should be set a farthing too high, the operation would fail. This is so well known, that in that case it never has been employed. But if it were really worth eight or ten guineas, and valued at as many shillings, (a case as frequent as the other is unexampled), such undervaluation would not impair the efficacy of the remedy.

The offence may even be precisely the same, and yet, no burning no veracity. Theft to the value of tweldepence farthing is grand larceny, and grand larceny is burnable: theft to no greater value than tweldepence is but petty larceny, and petty larceny is not burnable. The grand theft consequently, when properly punished, that is, properly pardoned, leaves the veracity unimpaired: the petty theft (till a late statute came in aid) destroyed the veracity beyond recovery. Whether, for example, the veracity of a Londoner who had stolen a quartern loaf was recoverable, depended upon the assize of bread in London as settled for that week: for, stealing the self-same loaf under the self-same circumstances, would be the grand or the petty offence, according to the assize.\*

Neither is it to any such cause as the consummation of the punishment, and the change of character inferred from the operation of its reforming powers, that the return of veracity is

\* It may be argued on the other side, that though the material subject of the larceny, the loaf, is the same, and every thing else the same, the value, and thence the offence, is not the same, since there is the farthing's-worth of difference. This may be very true; and yet the facility of revival on the part of the veracity is not as the magnitude of the offence. It is, on the contrary, in the inverse ratio of that magnitude: for the sole difference in the two instances is confined to the value, and it is in the greater offence that the veracity revives,—it is in the lesser that it is unrevivable. When I say *unrevivable*, I mean by common law. But no difficulties are too arduous for legislative wisdom. Parliament has spoken; and the farthing's-worth of difference has been done away. Since the 31st of the late king, petty larceny no longer incapacitates. Before many centuries are at an end, who knows but that, by farthings'-worths at a time, the whole mass of incredibility may have been removed?

to be ascribed. Other punishments may run their course; other punishments, whatever may be their duration, may have run their course, and the incredibility remain unextinguished. It is not time, but heat, that works the cure. Neither does whipping possess any such virtue as that of a restorative to veracity: for whipping is not fire. A conviction of an offence, for which whipping is the sentence, expels the veracity; but the execution of the sentence does not in this case bring it back again. To a plain understanding, the incredibility might as well be whipped out as burnt out, or the new credibility whipped in as burnt in: but this, it seems, is not law. There is no purifier like fire.\*

Doubts have arisen how an application made to the hand should ever reach the heart. There are some people that will raise doubts out of any thing: some have been seen sitting upon benches for years together, without doing any thing but raise doubts.

Not many years ago, an ingenious physician

\* There are cases indeed, in which whipping, or fine, or transportation, or any other kinds of punishment, have all the virtue of burning: but this is only when they have been substituted for it by act of parliament: in all other cases, nothing but burning will serve. The benefit of clergy has of itself no virtue; burning, or a statutory substitute is indispensable. "In Lord Warwick's case," says Phillipps (i. 32) "one who had been convicted of manslaughter, and allowed his clergy, but not burnt in the hand, was called as a witness for the prisoner; and on an objection to his competency, the lords referred it to the judges present, who thought he was not a competent witness, as the statute had made the burning in the hand a condition precedent to the discharge."—*Editor*.

of the mechanical school, used to extract "mercury out of the bones." It was discharged in an uninterrupted stream, by an hydraulic machine of his own invention: for years together the advertisement was repeated in the London papers. Sir Kenelm Digby's method of curing wounds was by applying a small quantity of his sympathetic powder to a few drops of the blood: the cure was performed "without hindrance of business, or knowledge of a bedfellow:" the patient might all the while be at any number of miles distant. This with him was every day's practice. Vide the cases, as reported by the learned knight himself. These cases are much stronger than the case in question.

2. *A Great Seal.* The sort of great seal to be employed on this occasion, is that which is employed for granting pardons. Supposing (what has sometimes happened) the ground of the pardon to have been the persuasion of the convict's innocence, the restoration of the admissibility would, under the rule of consistency, be a necessary consequence: in every other case, whatever propriety there might be, consistency is out of the question. An experiment was once made by another sort of seal, called a privy seal: the experiment failed: the seal was not found to be big enough.\*

\* The English of this is, that it belongs to the Chancellor, not to the Lord Privy Seal (or at least not to the Lord Privy Seal alone) to grant pardons. Understand, in a direct way: for in an indirect way, as above shewn,† it belongs to any body.

[A statute of the last session but one, (6 Geo. IV. c. 25)

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† See Book VIII. TECHNICAL PROCEDURE. Chap. 14. Nullification.

The pardon, has it been a pardon upon the merits, or not upon the merits? What sort of a thing is a pardon upon the merits? by what mark is it to be distinguished from a pardon through favouritism, corruption, or caprice? What are the proper grounds for pardon?—What lawyer ever thought it worth his while to put to himself any such question?

All these questions, together with many another that might be added to them on the ground of reason, are, fortunately for the reader, rendered superfluous by two determinations on the ground of positive law. Unless in particular circumstances, exclusion on the score of infamy is not done away by a pardon on the merits; it is done away by a pardon which cannot by any possibility have been a pardon upon the merits: I mean a pardon granted by statute, at a particular time, to all malefactors without distinction. In this case the instrument is,

3. *A Sceptre.* The power of this engine, as applied to other purposes, is no secret: in the character of a restorative of trustworthiness, it has never yet received the attention it deserves. In the case of the burning iron, the principle upon which that instrument acts, has, to render it clear, been declared to be the same as in the case of the statute pardon. The sceptre may, to this purpose, be considered as composed of an infinite number of burning irons, applicable at the same time, and (like Sir Kenelm's sympathetic powder) at a distance, to an indefinite number of hands. Inquiring into

enacts, that a pardon under the sign manual, and countersigned by a Secretary of State, shall have the same effect as a pardon under the great seal.—*Editor.*]

each man's conduct and character would give infinity of trouble. By so simple a contrivance as the application of a sort of rod, called a sceptre, to a roll of parchment, all this trouble is saved.

So far, every thing is as it should be. But one consideration presents itself, suggesting melancholy reflections. The power of trustworthiness and untrustworthiness is vested in the same royal and sacred hands as the power of life and death. If it depend upon the pleasure of his Majesty to extirpate the virus of mendacity from any the most corrupted hearts, and in any number, so must it *à fortiori* in any less tainted hearts, *à multo fortiori* in all untainted ones. Observe, then, the malice, the habitual and hereditary malice, of the advisers of the crown for so many successive ages: at no greater expense than that of a piece of parchment, with the momentary use of a gilt stick, the expense of which is incurred already, they might banish for ever the spirit of mendacity from the lips of men: they might make all men trustworthy, and they will not.

It has been exactly with these advisers of the Defender of the Faith and so forth, as with those of the Pope of Rome. Possessing the key, it depended upon him (the successor of St. Peter) to throw the gates of Paradise wide open, as those of Kensington Gardens on a Sunday! Yet did he keep them shut; opening only now and then a wicket, all for the paltry profit of selling tickets one by one.

4. To conclude, and crown this list of cabalistical and preternatural restoratives of trustworthiness when expelled by improbity;

we come to one, the operation of which, though more powerful than all of these put together, is altogether natural, and in "the ordinary course" of things." This (if, in this case as in the others, the instrument must be specified) consists of the tongue of an attorney-general, employed in so familiar an operation as that of telling a lie. An assemblage of words, purporting to be a history of the prosecution, with the judgment in which it terminated, is written upon a piece of parchment: this parchment is called a *record*. Lies there are always in it, or it would not be what it is: errors scarce ever. In the case in question, at any rate, there are none. This will not hinder the attorney-general from coming into court and saying (if he is in the mood), "I confess errors in the record:" so sure as he does so, so sure is he to be taken at his word.\*

It has been already mentioned as among the intermediate ends of lawyer-craft, to corrupt the morals of the people; and among the means to that end, the planting and cherishing in the public breast the love of lies, by causing their salvation to be conveyed to them, on every favourable occasion, through that corrupt channel. On the present occasion, that sinister

\* Smith, if that be the man's name, spelt with a *y* instead of an *e*, or with a superfluous *e* at the end of it. For finding errors, of a sort fit to be confessed, a sure way is to make them; but should there happen to be none, it comes to the same thing.

N.B.—Should these errors, or any other errors, have been made by the attorney's clerk by whom the indictment was drawn up,—left or made in it, whether to save the trouble of reading over, or to oblige a friend,—they are as good errors as if they had been made by the attorney-general himself.

policy employs itself with peculiar advantage. Pursuing this line of policy, lawyers have heaped mischief upon mischief, that lies upon lies might be employed, and popularity upon popularity gained, by curing it. They have acted as a surgeon would do, who, having a mad dog tied up, should secretly cut or slip the knot, that the animal, on gaining its liberty, might send in to its master a supply of patients. In an endless variety of shapes, they have entailed ruin upon the innocent, and against this ruin they have left no remedy but in a lie: for the guilty, yes; but for the innocent there is no mercy, no safety, but in a lie. A Pandora's box is opened upon the people; and such is the contrivance of the machine, that in nothing but a lie shall there be power to shut it. Under such a system, where is the bosom that can defend itself against the love of lies?

American savages have been proverbial for cruelty. The savage is mild and placable compared with the English lawyer. The savage minces or broils his enemy, and is satisfied: the lawyer, at a whisper from above, gluts on the child unborn his unprovoked and mercenary cruelty. No mischief is so unasuageable as that which employs for its instrument a mass of corrupted language. Perillus's bull, after it had broiled its author, was soon laid upon the shelf. *Corruption of blood*, the invention of a corrupted understanding, at the suggestion of a corrupted heart,—that most barbarous of all abuses of words,—remains, if the lawyer have his will, remains to corrupt justice as well as language, to the end of time.

By a lie from the attorney-general, lawyer-craft's last shift, (such virtue is there in a lie) even this syphilis, so dexterously inoculated and so strictly entailed, receives its cure. The lie is spoken, and the patient is made whole : and not he alone, but in and through him an endless line of patients.

In this same *ultimum remedium*, the suitor, to whose indispensable witness (guilty or not guilty) it has happened to have been convicted of perjury, beholds, in one case, his only hope.

I say in one case : for here comes in quibble upon quibble. Prosecute at common law, the inadmissibility is pardonable : prosecute upon the statute, (for there is a statute against perjury), it is not pardonable. How is it then ? In this case, and this alone, has the sovereign been ill enough advised to tie up his own hands ? Not he, indeed : but the man of law, the corrupter of blood and language, has tied them for him : the same sophist, who, by his quirks, ousted the innocent of pardon in that former case, follows up his blow, and ousts another set of innocent persons, of whom (as in the former case) this, and this alone, is known, viz., their innocence. Such is the doctrine, as it stands in the books. Not that any judge need be bound by it, any further than it is agreeable to him to be bound by it.

Cleansing our lips of the flash language, emerging from the regions of imposture, let us speak, if possible, in plain English. The power of the privy seal to remit punishment, and therewith to restore the faculty of giving testimony, having been questioned on the behalf

of the chancellor, was disallowed. But the power of the chancellor, as we have seen, has its limits. Among the officers of the crown, to the power of the attorney-general, and to that alone, these limits oppose no bar. The privy seal (it may be said) being placeable and displaceable by the king, also the chancellor, also the attorney-general, the distinction is but nominal: in every case it is the power of the king, acting only by different hands. To a second glance, however, there will be a very substantial difference. Each functionary, so long as he retains his office, retains at least a negative upon every thing that is done in it. Restrained by any considerations whatever, let the attorney-general for the time being refuse to confess errors,—unless by some strange mishap there should be errors (and then perhaps not in all cases) the testimony would be inadmissible.

Meantime, in this account is assumed a proposition which not improbably may not be true, viz. that,—in virtue of a record, in which, at the suit of the king, conviction and judgment are registered without outlawry,—in the same way as outlawry is done away, in a case where the king is nominal plaintiff, by the king's attorney-general, by so easy a process as the telling of a lie, so, in case of conviction and judgment, may all other penal consequences, by the same lie. Perhaps this may not be true. It would be scarce worth walking across the room to see all that has been said about it. When once we steer a hair's-breadth out of the sphere of every day's practice, every thing is matter of cross and pile. Jurisprudence is not among the sub-

jects of human knowledge: to predicate certainty of it, or any thing approaching to certainty, certainty to a discourse which has not so much as a certain word belonging to it, is an abuse of language. Where statute law is, and judges in due subjection, there, and there alone, is certainty.

What the lion has strove in vain to do, may sometimes be done by the mouse. It has already been stated, that, if the parchment is out of the way, the competency of the perjurer sets the gainsayer at defiance. Here, then, is a power of restoration, vested in any hand which, by fair or foul means, with or without risk, can gain a momentary command over the necessary parchment. I throw out this as a hint to the ingenuity of future functionaries, wheresoever stationed and howsoever denominated, who, with or without right, possess the physical faculty of taking in hand these mysterious parchments. Which would be the more *astute* contrivance,—smuggling the parchment for a few minutes, or confessing errors in it when there are none, and by a man who has never looked at it?

On other occasions, availing themselves of the power they possess *de facto* over these precious parchments, judges have made out of it for themselves the faculty of leaving a man in possession of a remedy, or depriving him of it, at pleasure. For example, in the case of a prosecution deemed malicious. They begin with so ordering matters, that, without possessing a copy of the record (the record in which the history of the prosecution is supposed to be given), no man thus injured shall

have it in his power to seek redress: this done, they allow him this copy, or withhold it from him, at pleasure.

The expedient is so perfectly in the style of jurisprudential science, that, though an innocent man were to be saved by it from punishment, or the widow or the orphan from losing their subsistence for want of evidence, I should not despair of seeing it (if occasion served) employed in practice.

Were any other instance wanting, the practice called *withdrawing the record* might serve to shew that these mysterious tabernacles of pretended truth are never employed in a manner so congenial to their destination, as when, like cups and balls, they are in some way or other made the instruments of trick and subterfuge. By an unlearned reader, a record of the court, being a history of the proceedings of the court, would naturally be supposed to be the work of an official hand, treasured up in official custody, and as little in danger of finding itself in any other than official hands, as the regalia at the jewel-office. Alas! by the mob of gazers whose station is at a distance from the curtain, how imperfect the conceptions formed of the mysteries acted behind it! It is the destiny of these jewels of the jurisprudential treasury to find a Colonel Blood in every plaintiff whose attorney sees reason to urge him to this daring enterprise. By so simple an operation as the filching (*anglico-jargonicè*, withdrawing) the record,—the plaintiff, should it be his fortune to discover in time a momentary gap in his evidence, gives himself a right to a new trial: while, under exactly the same necessity,

a defendant would be left to take his chance, trying the cause a second time upon affidavit evidence, to know whether it shall be tried a third time upon proper evidence.

Necessity, the mother of invention, will sometimes give birth to expedients, which, when once brought to light, are afterwards adopted by convenience. In the theatre of the ingenious Mr. Astley, the lips of the *dramatis personæ* being sealed by authority, silks, upon great occasions, perform the office of sweet sounds. From this humble station might not a hint be taken for the use of a more exalted theatre? A statue (any one of the three kings might serve) attired in the costume of the great officer of the crown, his majesty's attorney-general; and upon the pulling of a string, a scroll, as it drops, unrolls itself, with this epigraph: "his majesty's attorney-general confesses errors in the record."

. Not that it is in the nature of things, that in any rank (much less in so high a rank) an English lawyer should feel himself less at his ease when saying the thing that is not, than when saying the thing that is: far be it from this pen to dip itself in any such injustice: in that point, there could not be any the smallest difference between the living person and the statue. But a case not unfrequently realized is, that,—the habitual station of that high officer being, not in that high court in which, besides the three wooden kings, the "king himself" is, in the intendment of law, always present, but on the other side of the passage,—the consequence is, that as often as errors are to be confessed or any other function to be per-

formed by the person of that high officer in that high court, the passage is to be crossed. This is the inconvenience, in tender consideration whereof, the proposal is submitted: it being considered how perfectly light in the balance any quantity of mischief of which non-lawyers are the bearers is, when set against a grain of inconvenience pressing upon any such learned, especially any such eminently learned, pair of feet or shoulders: there needs no rhetoric to impress upon learned minds a due sense of the magnitude and importance of the occasion.

What if the learned gentleman in office for the time being were to come into court once for all, and confess errors in all records present and future; taking, *pro hac vice*, lies for errors? Alas! that would never do: in the first place, it would be true: it would rip open the hen whose eggs are fees.

Such are the restoratives to competency, under English law.

Is there any part of this theory of restoration capable of being regarded in a serious point of view? Let us try: let us take that which presents the gravest aspect. From the burning iron, the great seal, and the sceptre, (it may be said), no great matters are to be expected: admitted, of all these instruments, admitted: they leave the man as they found him. But the little seal? this is quite another affair: this does not leave a man as it found him: this actually destroys his interest. In a will, a legacy of 50*l.* is given to a man who otherwise would have had nothing: does not that give him an interest in supporting the will by his testi-

mony? He agrees not to accept the legacy: and, in evidence of such agreement, commits it to writing (it is then called a release), and puts his seal to the release. His right to the 50% is now clearly gone: and is not his interest, the supposed mendacity-promoting motive, gone with it?

No, indeed is it not: still the same imposture, only a little more thickly covered.

In the first place, let it never be out of mind that, according to the principles of the exclusionists themselves, (as far as their principles can be judged of by their practice), the nostrum never can be of any manner of use; since, be the interest which a man is under ever so great, they admit him notwithstanding: they admit him, as we have seen already, when he is an extraneous witness; they admit him over and over again, as will be seen further on, when he is a party.

In the next place, if the state of the mind be at all considered, it is not in the nature of the case, that from the operation (make the most of it) the state of the witness's mind should experience any material variation.

He releases, he gives up his interest. But whence came this sacrifice? The sacrifice may be to any the greatest amount: but to any the least amount, a sacrifice without an inducement is an effect without a cause. One cause alone constitutes any rational mode of accounting for such a sacrifice, viz. a treaty between the proposed witness and the party to whose interest the testimony (it is understood) will be serviceable. But if any such treaty has taken place, the witness must have said over and over again, and naturally to, or in the hearing of,

more persons than one, — so and so is what, at such a time and such a place, I saw: so and so is the testimony I have to give. In other words, over and over again it must have happened to him to have delivered extrajudicially, in the presence of a variety of witnesses, in substance and effect (if not in tenor) the very evidence which, if admitted, he will have to deliver in judicial form and place. How, then, can it be said, that, when the pecuniary interest is out of him, supposing it really out of him, he is devoid of interest? If that be true which is so decidedly affirmed as well as disaffirmed by English lawyers, that reputation, reputation for truth and honesty, be of no value to a man, then indeed he is devoid of interest: but if reputation be of any the least value to him, if he would part with so much as a farthing to preserve it, then, even in that case, he has still an interest: and an interest adequate, according to them, to the production of mendacity in any case.

Here, then, is an interest, and that an adequate one; an interest not taken away by the operation, but still subsisting. Remaining in all cases, it supersedes the necessity of looking out for any of those modifications which may be produced by any difference in the nature of the interest in different cases. But, for illustration and still more complete satisfaction, let us look a little way into those differences.

In the next place, then, here is a transaction between two parties: an inducement there must have been on each side, or the transaction could not have taken place. On the one hand, unless an advantage in some shape or

other accrued to him from it, the releasing witness would not have performed his part in it: and moreover, on the other part, unless some advantage accrued to the party, neither would the party have borne his part. But this advantage to the party could not, in the nature of the case, have been constituted by any thing else than a tie of some sort or other, direct or indirect, engaging the witness to persevere, and deliver in court evidence to the same effect as that which had been delivered by him out of court. What particular shape it may have happened to this tie to assume in each individual case, it would in general be fruitless, and always needless, to attempt to investigate.

Take the matter in another point of view. The testimony thus vamped up, is it true or false? If true, the vamping is of no use: if false, what then is the effect of it?

Useless then it is most completely, this lawyer's pantomime. But though useless, it is far from being inoperative: it is practically mischievous. Though interest never can be a just cause of *exclusion*, it never can fail to be a just cause of *suspicion*. The object of the mummery, the effect of it, if it has any (and it is not the lawyer's fault if it has none), is to wipe away this suspicion from the mind of the judge; to cause a man, whose testimony is really under the action of interest, to be regarded as if it were not.\*

In some obstinate cases, the virtue of the

\* In a case decided in the last reign, decided in the time of Lord Mansfield, a doctrine is laid down, by which, if acted upon, all objection to the competency of a witness on the score of interest is virtually done away. (Peake, 106.) A

little seal has been found not altogether strong enough for the work assigned to it. An occa-

sion having a natural interest in the event of a cause, making a bequest to gain by the establishment of the validity of a contested will (the bequest of the reversion of a copyhold estate), offered to give up his interest by giving up his claim to the bequest. The party to the cause, the party principally interested in the establishment of the validity of the will, declined acceptance of the offer. The testimony was admitted as competent, though the offer was not accepted, and the contest remained. From this time, the decision having remained unquestioned, nothing but a mere pantomime can be necessary to the removal of the bar to the competency of a witness on the score of interest. The witness makes his bow to the attorney for the party, and tenders a piece of parchment called a *surrender or release*: the attorney makes his bow to the witness, and puts by the parchment.

In that instance, perhaps, to obviate the imputation of collusion, the party to whom the surrender was tendered was the heir-at-law, the party prejudiced by the establishment of the will. This party, thinking probably that the effect of his refusal would be to knock up the will, refused to accept the proffered benefit: he would have got this part of the succession, but, by the consequent establishment of the whole will, he would have lost every other part.

Would the decision have been the same, had the surrender instead been a surrender made for the use of the residuary devisee or legatee? It might have been, with nearly as little danger to truth, and with more benefit to substantial justice. In this case, the party to whom the offer was made, and the party by whom it was made, having each of them a perfect and undefealcated interest in the establishment of the will, the maker of the offer might have been assured beforehand of the non-acceptance of it; which he could not be, in an equal degree, in the other case: since the heir-at-law, rather than care nothing, might in that case have accepted the offer, and in a future similar case certainly would accept it: the devisee had every thing to gain by agreeing to refuse the offer, and every thing to lose by not agreeing to refuse it; since, if he did not undertake to refuse it, the witness, having no motive for making it, would not make it, and so his testimony could not be received.

sion is upon record, in which, maugre all the efforts made by the witness to get rid of the interest, and with it of the matter of untrustworthiness, it stuck to him like birdlime, so that the consequence was, he could not be received. Experiments are not unknown to jurisprudence, any more than to other arts. The milder, howsoever morbid and peccant, matter of interest, might it not be absorbed as it were by the more acrid matter of felonious untrustworthiness? Might not the matter of interest be considered as *merged* in that of felony? The doctrine of *merger* has done in its day greater feats than this. If this be admitted, every thing else is plain sailing. Witness, having an interest not purgeable by release, commits a felony: nothing more easy: felonies are committed every day for much worse purposes. Plaintiff prosecutes: witness pleads guilty, puts on a bacon glove, and is burnt in the hand: attorney-general confesses errors in the record; which, whether there are any or not, he is always ready to do, on proper occasions and proper considerations. If one of these operations will not be sufficient, the other will: at any rate both together.

Thus, if you have the misfortune to tar your coat; put a little butter to the tar, the tar is merged in the butter: rub on a little oil called spirit of turpentine, tar and butter are both merged in it: all together merge in air, thin air, and your coat is as admissible as it was before.

The pharmacopœia of technical restoratives bears no slight analogy to the impostures that at different periods have been seen acted on the

spiritual and medical theatres: to *exorcism*, *animal magnetism*, and *tractorism*.

Of the operations of the exorcist, the success is infallible, in the expulsion of non-existent devils: of those of the magnetist and the tractorist no less so, in the expulsion of non-existent diseases. Of the operations of the lawyer, or rather the knot of lawyers (for here co-operation is necessary), the success, in respect of the expulsion of the demon of mendacity out of the breast of the patient, is no less assured, provided he was never there: if he has not been there at the moment preceding the operation, neither is he immediately after it. But if at that antecedent instant of time the demon was in actual possession of the premises, is it in the power of the release with its talismanic seal to eject him? The prayers and mandates of the exorcist, the arm of the magnetist, or the brass of the tractorist, would be of equal efficacy.

In these several impostures, as in most others, the respective operators have this in common, that, in the instance of any given individual, it is not always altogether easy to determine to which of two congenial and co-harmonizing classes he appertains, that of the impostors and that of the dupes. As to the jurisprudentialist, his most common state is, perhaps, a sort of middle state between the two. What he knows is, that the pretence makes business and brings fees: what he cares not about is, whether it be true or false.

In one respect, the jurisprudential operators fall far beneath the medical and pneumatological. By the force of imagination, in addition to the

non-existent diseases, the magnetizer and the tractorist may not improbably have now and then administered cure or relief to an existent one. By the same powerful though unsteady instrument, it may even have happened to the exorcist to have quieted or soothed real and excruciating perturbations, howsoever derived from an unreal source. But after the acts of exorcism performed by the lawyers for driving the demon of mendacity out of the bosom of the witness,—if so it was that at the time of clapping the seal to the parchment he was in possession of the premises, in any one instance could he ever have been expelled?

On the north side of the Tweed, witnesses (we have seen\*) are subject to a kind of disease called *partial counsel*. It seems to be a sort of contagion, the matter of which is adherent to the witness's box. Fortunately, the *Pharmacopœia Edinburgensis* affords a specific for it: it is of the cathartic class, scientifically (shall we say, or vulgarly?) called a purge. A dozen or two of words are given a man to gabble *secundum præscriptionem*, he having first placed himself duly in the place and posture of a man giving evidence, and the remedy is at once administered.

As to the peccant matter, fortunately for the bystanders, it goes off, not by the *primæ viæ*, like the matter of incredulity in the bosom of Felix, when, as in Hogarth's print, expelled by the eloquence of the Christian orator; but by a sort of insensible transpiration.

\* Vide *suprà*, p. 45.

As to its efficacy, the proof of it is in every day's practice. Not a case in which the specific has ever failed to be administered; not a case in which, after the operation, a patient was ever known to complain of any the slightest remnant of the disease.

## PART IV.

VIEW OF THE CASES IN WHICH EVIDENCE HAS  
IMPROPERLY BEEN EXCLUDED ON THE GROUND  
OF VEXATION.

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## CHAPTER I.

VEXATION TO INDIVIDUALS ARISING SOLELY OUT  
OF THE EXECUTION OF THE LAWS, NOT A PROPER  
GROUND OF EXCLUSION.

It has already been proved, that is, observed, (for surely this is one of those cases in which to observe is to prove), that there are cases in which exclusion of the evidence, on the ground of the vexation inseparable from the delivery of it, is a proper measure: viz. where the collateral mischief consisting of the vexation is preponderant over the direct mischief produced by the chance of misdecision or failure of justice resulting from the want of the evidence.

It was, at the same time, and in the same way, proved, that there are cases in which such exclusion, bottomed on that same ground, is not a proper measure: viz. all cases in which the balance as between the two mischiefs is on the other side.

The several cases in which the mischief of the vexation resulting from the delivery of the evidence is capable of being preponderant over

the mischief of misdecision or failure of justice for want of the evidence, have this common property, viz. that the vexation is produced by circumstances entirely independent of the uneasiness produced by the obligation of making any disclosure, the effect of which is to subject the proposed witness, or any other person, to any punishment or other burthensome obligation, to which it is the intention of the legislator that he should be subjected. It is produced, in all these cases, by circumstances accidental and extrinsic: for example, disproportionate expense by reason of a long and expensive journey or voyage; irreparable loss of time; disclosure of collateral facts, such as a third person has no right by law to be informed of.

Besides these accidental lots of vexation, there is, however, one, which may be considered as naturally, and in the ordinary course of things, attached to the obligation of giving evidence: and that is, the thought of the unpleasant and more or less prejudicial consequences, which the evidence may have the effect of producing, to the prejudice of the proposed witness himself or some other person, by reason of the execution of a judicial decision, of which such evidence may constitute, or help to constitute, the ground. By the idea of such consequences, considered as liable to be produced by the evidence, an unwillingness to deliver it (which is as much as to say, vexation in the event of its being delivered) will, in many cases, be produced. Concerning this unwillingness, indubitable or presumable, a notion has obtained, that, in many if not in all cases in which the exist-

ence of it is regarded as certain or probable, it constitutes of itself a sufficient reason for excluding the evidence to which it is regarded as attached. And, in one of the most enlightened nations of Europe, this notion, having been adopted by judges, and, under their authority, having formed itself into a rule or maxim of jurisprudential law, has constituted the basis of an arrangement exercising a most extensive and important influence over the whole fabric of the law of procedure. Regarding it as one of the most pernicious and most irrational notions that ever found its way into the human mind, I propose to allot this whole Part to the task of sifting it to the bottom, in the hope that the labour employed in a task at once so important and so new, will not be regarded as ill-bestowed.

To constitute a just ground of exclusion, the lot of vexation here in question must be a mass of that evil over and above what would have been produced by a decision to the same effect grounded on other evidence; on any evidence to which the lot of vexation in question would not have been attached. For, supposing the exclusionary notion to extend to all other evidence,—to other evidence at large,—to whatever vexation might come to be produced by evidence of whatever description, having the effect of subjecting some person or other to the punishment or other burthensome obligation in question;—to say that, in consideration of the vexation thus resulting, no such evidence ought to be received, would be as much as to say, there ought not to be any such thing as a punishment or other burthensome obligation

ever imposed; in a word, that there ought not ever to be any such thing as a *law*.

But (it may be said) there are such things as bad laws: and in no country is the body of the laws altogether free from them. Now, the effect of the practice which, in opposition to the exclusionary rule in question, forces testimony from persons of all descriptions, without regard to unwillingness and consequent vexation, is, to give to whatever substantive laws it is employed in giving execution to, a degree of efficiency much beyond what they would possess in the opposite case. But, by giving this extraordinary degree of efficacy to all laws (substantive laws) without distinction, it will give the same degree of efficiency to as many bad laws as it happens to the aggregate body of the laws to include: and forasmuch as in every existing system the extent of this mass of bad laws is more or less considerable, the mischief of the practice against which the door is shut by the exclusionary rule would be proportionably great.

In the character of an argument in favour of the exclusionary rule, the defect of this argument will, I imagine, be found apparent upon the face of it. But inasmuch as, when sifted to the bottom, it will be found to lead to discussions of a very delicate and important nature, I do not propose to leave it ultimately in its present state, to stand altogether upon its own strength or weakness. For the present, however, confining the examination to the question immediately appertaining to the present book, I shall content myself with bringing to

view, by way of answer, the following observations: viz:—

1. Supposing that, for the accomplishment of the purpose stated in the argument, the exclusionary rule is, upon the whole, well adapted; it can be so in no other respect than that of its operating in the character of a debilitative upon the whole of that portion of the body of substantive laws to which it applies: weakening their efficacy, rendering them so much the less efficacious, in respect of the purposes which they respectively have in view. But, so far as this alone is considered as the result of the rule in question, and that result a beneficial one, it is no otherwise of use than as any other institution or arrangement would be of use, that should in an equal degree contribute to weaken the efficacy of the laws.

On one only supposition would the balance of its effects be on the side of benefit; and that is, if the aggregate body of the laws were so constituted, that the mischief resulting from such as are mischievous, outweighs, upon the whole, the good resulting from such as are of a beneficial character. But, that, even under the worst government of which any accounts are extant, the supposition here in question was ever realized, seems altogether improbable: for, on this supposition, a state of anarchy would be less mischievous than,—would be preferable to,—such a state of government.

2. The person to whom it is proposed to form his opinion, and consequent decision, respecting the propriety of the exclusionary rule, is the legislator. In the political state

in question, either that rule is not as yet established, or it is already established. If not; then, considered as addressed to the legislator, the argument stands thus:—

*Monitor.* In the state subject to your authority there are a multitude of bad laws: to weaken their efficacy, please to establish this exclusionary rule.

*Legislator.* Excuse me. Of such laws, if any, as in my judgment are bad laws, I shall not content myself with weakening the efficacy; I shall abolish them altogether. In regard to such of them as in my judgment are good laws, I should be sorry to do this, or any thing else, that should in any degree weaken their efficacy.

Shift now the scene to a state in which the exclusionary rule has already been established.

*Monitor.* In the state subject to your authority there are a multitude of bad laws. It has been proposed to you to abolish the exclusionary rule. Do no such thing: it is a most useful rule: it serves to weaken the efficacy, and thus to diminish the mischievousness, of your bad laws.

*Legislator.* Thanks for your caution. But being also fortunate enough to have a multitude of good laws, my wish is, to give to those good laws the highest degree of efficiency they are susceptible of. The effect of this exclusionary rule which you are so anxious to preserve, is (taking your own account of it) to weaken the efficacy of whatever laws, good as well as bad, it is applied to. Taken in its natural state, and unless subject to limitations to which you do not propose to subject it, it applies to all laws, and weakens the efficacy of all: it is for

this reason I mean that it should no longer have any application to any of the good ones; and it is in that view that I mean to abolish it altogether. As to the bad laws, I shall not content myself with weakening their efficacy: convince me of their badness, and I shall abolish them.

*Monitor.* But, among those laws which in your judgment are bad ones, and which accordingly you propose to yourself to abolish, may not there be some, which, regard being had to the affections and prejudices of the people, it would appear to you not advisable to abolish?

*Legislator.* I should be sorry to find any such: but if such there be, there are several courses, any or all of which I should prefer to the giving up the benefit of the increase which the abolition of the rule would give to the force of such of the laws as to me seem good ones.

1. I would cause to be laid before the people the reasons by which my disapprobation of such laws as to me seem bad ones was produced. Having operated upon my mind, probably enough they may operate on other minds; especially as coming from a station from whence, if tolerably well dealt with, men are apt enough to take their opinions as well as their laws. And, moreover, should it so happen, that, by my reasons thus made known, any others should be brought forth that in my maturer judgment should prove preponderant over mine, I propose to myself to take the opposite course; viz. to go over to the side of the people, instead of their coming over to mine.

2. In the mean time, if I despaired of being

able either to bring over the people to my opinion, or to carry over mine to theirs, I could, if I thought it worth while, leave the debilitating rule to apply itself to the particular laws thus appearing to me to be bad ones. Leaving these laws in that state and degree in which I found them, the people would have no reason to complain of me; and, barring the operation of the rule in debilitation of my good laws, I should give to them all the operative force which it is desirable that good laws should possess.

In the case where the evidence in question is of the self-regarding, the self-criminating kind; if testimony extracted from a man's own lips were attended with any the smallest degree of probability of unjust suffering on his part, over and above that which results from testimony extracted from an extraneous and indifferent witness, there would then (on the ground of danger of deception and consequent misdecision) be, in point of reason, a ground, not for exclusion indeed, but, however, for suspicion and caution more than ordinary on the part of the judge. But who does not see that the supposition thus brought to view for the purpose of illustration and argument, is a supposition which holds good, not in the present case, but in the case directly opposite, viz. that of self-serving testimony? with only this difference, that, whereas in that case there is only a chance of the existence of falsehood on that side, there is a certainty of the non-existence of it in the present case. It is not every man that will swerve from the truth for his own advantage: a man of entire probity will not, to

the value of a hair's breadth. But there is not that man breathing, who, being in his right mind, and his own interest alone at stake, ever will knowingly swerve from the line of truth to his own disadvantage.

There is but one sort of evidence which, practically speaking, is free from all danger of producing deception by mendacity; and this is the sort of evidence upon which an exclusion has been put by English lawyers.

Two men have each committed an offence, or done, each of them, an improper act of any other description: an act which in both cases is improper in the same degree and the same way. In the instance of one of them, it so happens that the act can be proved against him without resorting to his own testimony: in the other instance, so it happens, that, though with the help of his own testimony it would be proved upon him, yet without that help it cannot. Is there any earthly reason why the lot of one of these men should be better than that of the other? why his suffering should be in the smallest degree less? Yet, under the exclusionary rule, one of them suffers not merely less than the other, but absolutely nothing; while his not more guilty fellow suffers the full rigour of the law.

Cross and pile (whether antecedently or subsequently to conviction) would not, by man in general, would not certainly by English lawyers, be regarded as a just and proper method of determining, amongst two or more equally guilty, which should and which should not suffer. Cross and pile, when called in by the common sense of jurymen for their relief in a

situation of honest doubt, has been reprobated with indignation by their learned and official directors. But, in the case here in question, acquittal by cross and pile would be a signal improvement, if substituted to acquittal by the force and virtue of this exclusionary rule. In cross and pile, the naturally-sagacious or learnedly-instructed knave would not behold any means of safety more open to himself than to his less instructed fellows : whereas, it is the nature of the exclusionary rule to operate as a license for delinquency to all those whose astuteness, seconded by ordinary good fortune, enables them to take advantage of it. Who shall count the multitudes that day after day have been acting under this license ? For it is among the properties of this invitation to guilt, that those who act under it with most felicity and success are those who enjoy the ulterior advantage of not being known to have acted under it.

That, under the protection of this license, the impunity of the wicked may be as complete, and the encouragement to wickedness as inviting, as possible ; malefactors and lawyers have joined in another practice. Under circumstances of notorious delinquency, liberated in virtue of this or any other incident foreign to the merits, malefactors may be seen every where holding their heads high, and (as often as occasion presents itself) assuming the port and language of injured innocence. Accordingly, when a delinquent has been thus fortunate, to speak of him in the character of a delinquent is an offence punished, and with equal rigour, as if the object of the imputation

had been a character of the purest innocence. In a place where (happily for the existence of society) the offensiveness of unwelcome truth to the feelings of evil-doers does not enable them to transfer upon their censors the punishment due to themselves, what a clamour was once raised by the appellation of *acquitted felons*! As if an acquitted felon was a sort of animal no more capable of finding itself in existence on English ground, than a spider was supposed to be in Ireland. All this while, under the genial influence of this and so many other rules so ingeniously and successfully directed to this end, acquitted felons and acquitted malefactors of all sorts and sizes are as much at home in the British Isles, as venomous serpents in Guiana, or crocodiles in the Nile. In a relaxed constitution of the body politic, acquitted and unprosecuted malefactors of all kinds are no less congenial to that artificial body, than, in a constitution of the same character, the *tænia*, the *lumbricus*, and the *ascaris*, are to the natural body. In one particular, the parallel discovers an unhappy failure. In the natural body, it is not in the power, and as little (let us hope) in the wish, of the licensed practitioner, to propagate the breed of the vermin to the plague of which it is exposed: whereas, in the political body, by the instruments which there has been such frequent occasion to bring to view, we have been seeing the hand of the practitioner occupied, with unwearied perseverance, in sowing the seeds of wickedness in every imaginable shape.

## CHAPTER II.

ENUMERATION OF THE SORTS OF EVIDENCE  
IMPROPERLY EXCLUDED ON THIS GROUND  
BY ENGLISH LAW.

VARIOUS are the points of view in which the vexation, that in this case appears to have been taken for the ground of the exclusion, has been contemplated: various the correspondent modifications of which the evidence, regarded as the cause of such vexation, has been considered as susceptible; and the correspondent specific denominations that either have been, or (to express those several points of view, and the consequent arrangements they have given birth to) require to be, respectively affixed to those modifications. Numerous are even the sources from whence those modifications have been derived.

1. The nature of the consequences of the evidence in respect of good and evil. Hence the distinction,—evidence of a nature to serve, evidence of a nature to disserve.

2. The identity or diversity of the person yielding the evidence, and the person affected by the consequence of it. Hence the modifications expressed or expressible by the appella-

tives *self-serving*, and *self-disserving*, or *self-prejudicing*.\*

3. His station in the cause: whether that of a party or an extraneous witness. No appellatives deduced from this circumstance; but, in respect of the legal arrangements, much importance given to it.

4. Nature and denomination of the suit, on the occasion of which the evidence is proposed to be delivered; viz. criminal, or non-criminal (commonly called *civil*).

5. Nature of the evil constituting the vexation; viz. the evil or disservice produced by the disclosure. From this source, and the second and fourth taken together, come the modifications expressible by the several appellatives *self-criminative* or *self-inculpativ*e, *self-disgracing*, *self-discrediting*, or simply *self-onerative* (as where blame is out of the question).

6. The nature of the affection which is the seat of the vexation; viz. whether self-regarding or sympathetic.

Where one person (a *trustee*) stands charged with the interests of another (a *fidei-committee* or *cestuy que trust*) as in the case of guardian and ward, factor or agent and principal, lawyer and client (especially where the existence of the relation is voluntary on the part of the trustee), an affection of sympathy, of which the *fidei-committee* is the object, may naturally enough be supposed to exist in the bosom of the

\* Under the mutual appellative *self-regarding*, both *self-serving* and *self-disserving* are comprized. *Self-serving* evidence belongs not to the present purpose.

trustee. This being assumed, a consequence is, that where, from the evidence delivered by the trustee, a vexation or prejudice of the self-regarding kind may be expected to befall the fidei-committee, a proportionable (howsoever short of equal) vexation of the sympathetic kind may, in like manner, be expected to find its way from the same source into the breast of the trustee. To this head may be referred the most plausible reason that has been found for the exclusion that has been put upon what, taking the only appellative in use, and which is of the dyslogistic, or vituperative cast, may be called *trust-breaking* or *trust-betraying* evidence.

Where, a number of individuals living together in the character of members of the same family (as is the case with husband and wife, parent and child), evidence delivered by one member would be a cause of vexation to another; vexation in a mixed mass, partly sympathetic, partly self-regarding, is liable to find its way into the bosoms of these several members from that source. In this vexation we see the most plausible reason that has been found for the exclusion that has been put upon some of the modifications, and some only, of that which may be termed *family-peace-disturbing* or *family-disturbing* evidence.

When the effect of a lot of self-criminative evidence has been to produce the conviction of him by whom it has been delivered, it is capable of receiving the appellation of *self-convicting* evidence. But, forasmuch as, antecedently to conviction, this effect, not having as yet taken place, can only be matter of expectation and conjecture, the appellation could not, without impro-

priety, be applied to self-criminative evidence at any such antecedent point of time.

Laying together the modifications deduced from the several sources above mentioned, we shall find six species, each presenting itself as entitled, on some account or another, to a separate consideration. These are,

1. Self-criminative, reaching beyond self-onerative.
2. Self-onerative, and self-criminative not reaching beyond it.
3. Self-disgracing.
4. Self-discrediting.
5. Trust-prejudicing.
6. Family-peace-disturbing.

The effect of the testimony will be in some respects different, and the reasons for and against the admission of it stand upon a correspondently different footing, according as the station which the proposed deponent occupies in the cause is that of a party, or that of an extraneous witness. We will consider him successively in both these stations: as a party, in the ensuing Part; as an extraneous witness only, in the present.

## CHAPTER III.

IMPROPRIETY OF THE EXCLUSION PUT UPON  
SELF-DISSERVING EVIDENCE BY ENGLISH  
LAW.SECT. I.—*Uses of self-disserving evidence, and  
mischiefs resulting from its exclusion.*

THE fundamental rule on this subject is generally given in Latin. *Nemo tenetur seipsum accusare*: no man is bound to accuse himself. Taken by itself, the proposition, as thus delivered, having its source rather in the affections than in the understanding, has more of rhetoric in it than of logic, and presents no clear idea until it be translated into more simple language. The part of an accuser is one part; that of a witness is another. The part of the accuser is that of the plaintiff, of which that of the prosecutor and that of the informer are modifications; these being names that are given in different cases to the plaintiff, according to the nature of the cause. By "no man shall be *bound* to do so and so," is meant, no man shall be liable to be *punished* for not doing so and so. Of the proposition, "no man is bound to accuse himself," the literal meaning, reduced to clear and unambi-

guous language, is, no man shall be liable to be punished for not instituting a penal suit against himself; for not preferring a bill of indictment against himself, or lodging an information against himself; or not bringing a penal action against himself, or preferring an appeal against himself, as the case may be.

In plain English, the maxim is neither more nor less than so much nonsense. To find an intelligible meaning for it, we must have recourse to practice: we must shut up our law-books, and observe what passes before our eyes. We then find that the question is, not whether a man shall be bound to commence a suit against himself; nor yet whether, without being called, (the suit being commenced by any other person), he shall be bound to come and give evidence against himself: but whether, being called, and questions being put to him, he shall be bound to make answer to such questions.

The substitution is not a mere impropriety, but a sophism, a fraud. A law which should say to a man,—Whenever it happens to you to commit a crime, come and accuse yourself, come and give information against yourself,—would, on the face of it, be an absurd one. The object of the sophism is to cause it to be believed, that, in the liberty of propounding to a man under accusation or suspicion of a crime, questions, the object of which is to discover whether he is guilty or no, this sort of absurdity is involved. But, that no such absurdity is involved in that liberty, is what every body will see, to whom it is not more agreeable to shut his eyes.

Observe, too, what in this case is the import attached to the terms expressive of obligation; *bound, forced, compelled*. Observe what is the nature of the compulsive force.

Obligation to *speak* is not here in question. In the case where the penal process is of the acute kind, punishment directed to this object is what has been commonly expressed in French by the word *question*; in English, by the word *torture*.

*Obligation*, on the part of the defendant, there is in fact in this case none. What it imports is mere *permission*: permission to the adverse party (the plaintiff), and to the judge, one or both, to put questions to the defendant; for the sake of the faculty which thence results to the judge, of noting the answers or the silence (whichever is the result), and drawing his inference from them.

From the faculty of putting these questions, what is it that the defendant has to fear? It is this: From the known principles of human nature, according to a course of observation common to all mankind,—according to the result of a set of observations, which it can scarce happen to a man to have arrived at man's estate without having had frequent occasion to make,—between delinquency on the one hand, and silence under inquiry on the other, there is a manifest connexion; a connexion too natural not to be constant and inseparable.

The delusive language in which interested artifice has dressed out the exclusionary rule being thus stript off, let us now take a more detailed observation of the mischiefs flowing

These mischiefs will correspond to the species of evidence thus marked out for exclusion: i. e. to the occasions on which, and purposes for which, the demand arises, how to present itself.

In the first place, in so far as it is to be considered as already been stated as being (not only upon the face of it, but by the confession of those who, notwithstanding, have been in the want of excluding it) the very best possible sort of evidence: the evidence the most completely satisfactory: evidence, in a word, so completely, and even exclusively, satisfactory, that, according to the Roman system, after the delivery of such evidence as under English law is deemed conclusive even where the punishment is at the highest pitch, the mass of evidence is regarded as deficient without evidence of this kind; and the deficiency as being so important, that torture (howsoever ill employed) has, under the dominion of that jurisprudence, been every where employed for the filling it up.

First use of self-disserving evidence,—augmenting the security against misdecision and failure of justice, by furnishing the most trustworthy and satisfactory ground of decision; the best security against failure of justice, or misdecision, for want of evidence, viz. evidence of the best, most trustworthy, most satisfactory kind. *Habes confitentem reum*, says the Roman orator: as much as to say, Having this, what more can you desire?

2. This is not all. Under the distress produced by the exclusion put upon the best evidence, recourse has been had (through a sense

of necessity, and that the wound given to justice might not be past endurance) to bad evidence of various descriptions: evidence, the inferiority of which has, on other occasions, and where (for want of better) there has been a real demand for it, been not acknowledged merely, but proclaimed. Under this description come, 1. The supposed confessorial testimony of the party, delivered through the medium of hearsay evidence; and, of course, (in case of misconception, designed or undesigned) without the opportunity of explanation, completion, and correction. 2. Written discourse, supposed to be in the handwriting of the party, and supposed to contain on his part a sort of confessorial testimony, delivered in the state in which it has been supposed to be found, but, at the option of the adverse possessor, complete or mutilated; and, at any rate, without adequate opportunity given of explanation.

Second use of self-disserving evidence, — adding a security against misdecision and failure of justice, by adding or substituting more trustworthy evidence to less trustworthy.\*

\* It is curious to observe the desperate shifts to which legislators are put, in order to counteract the pernicious effect of the debilitatives which they have suffered to be introduced into the system of judicial procedure.

In one instance, for want of that best sort of evidence which lawyers have taken care to exclude, lawyer-led legislators have been forced to content themselves with, and to set down as conclusive, the very worst sort of evidence, viz. *common report*.

By one statute, reputed thieves, haunting the avenues of playhouses and so forth, are made punishable so and so.

If a man can be proved a thief, what matters it where he

### 3. The person whose bosom is the source of self-disserving evidence (the plaintiff, or more

is found? If he cannot be proved a thief by other means, how is it that his being found in the avenue of a playhouse is to prove him so, or so much as contribute any thing to the proving him so? Not to speak of passengers,—among all the persons who, from the building of a playhouse to the burning of it, ever entered into a playhouse, has there ever been a single person who was not found in one of the avenues to the playhouse?

A reputed thief? reputed such by whom? By the thief-takers. A reputed thief is a man who is believed to be such, by some person who is, or professes to be, acquainted with his habits of life. Who is that person? An accomplice? No; for in this case he would be able to speak to some individual transaction, in the course of which the reputed thief acted as one. In a word, and in experience, it is never other than a thief-taker.

But the thief-taker, by what means is it that he has come to form, concerning the man in question, an opinion pronouncing him a thief? By the word thief (though not in all cases and necessarily, yet obviously in the present case) a *habitual* thief, a man who is so by habit, is implied. To constitute a habit requires a multitude of acts. By any one single act is he capable of being proved to have been a thief in so much as a single instance? If so, there is no need of any such law.

What? Cannot you prove so much as a single act? Then how is it you can prove the habit? Cannot you prove so much as an act? Then how is it you can prove so many as (though it were no more than) two such acts?

Curious enough must be the sort of testimony on which a man is convicted under this law. Into the composition of it, no individual act can enter: *opinion*, the opinion of the thief-taker, is every thing there can be of it. I know him to be such: I know him to be generally looked upon as such: of this sort is all there can be of it. Against erroneous or mendacious testimony, the grand security is cross-examination: cross-examination, by which, if the individual facts charged are false, true ones (by their inconsistency with which, they are disproved) may be brought out against them. In no other criminal case would the depriving the defendant of the faculty of cross-examination be deemed endurable. In this

commonly the defendant, in the cause) is one person: that person is forthcoming, of course. Whatever evidence is extractible from that source is extractible on the spot, and without addition to the expense. Stop up that source, whatever evidence you can hope to get from other sources, if got at all, you must get as you can; from, perhaps, a variety of sources, from each at the end of an indefinite length of time,

case, by the very nature of the evidence (that is, of the only fact deposed to), the faculty of cross-examination stands excluded. When, in a case of this sort, a man says, I believe this man to be a thief; should the case be that he entertains no such belief, by what evidence can his falsehood be made appear?—Do you know of any one instance in which the man acted as a thief? This is the only sort of question, which, in the view of discrediting the declaration of opinion, could be asked; and this, by the supposition, is one that cannot be asked.

Not that to the account of the exclusionary system alone is to be placed the offence committed against justice by the law that has last been brought to view. It is the effort of necessity, struggling under the load of debilitatives, by which, under judge-made law, to that deplorable degree of which the printed accounts are witnesses, the arm of penal justice is enfeebled. Capital punishment, (by which humane men are deterred from testifying against crimes, more than dishonest men from committing them), this, together with the principle of nullification, (by which, on the ground of pretended errors discovered by fee-fed brethren, the power of pardon is given by judges to lawyers and their clerks), these, together with other causes of debility, the enumeration of which belongs not to this purpose, cannot but be admitted for their share.

But, independently of these concurrent causes, the single virtue of the exclusion put upon self-inculpativ evidence suffices to account for a large proportion of that mass of unpunished delinquency, by the contemplation of which the legislature was drawn into a measure so outrageously repugnant to justice as that which has just been brought to view.

and under the pressure of an indefinite load of expense. Hence,

Third use of self-disserving evidence, saving of delay, vexation, and expense.

A striking illustration of this last use is afforded by the case in which, for the conviction of a defendant, it is necessary that his handwriting should be proved.

As, at a trial at common law, the party himself (the defendant) can in no case be examined in behalf of his adversary the plaintiff; the plaintiff, to prove the defendant's handwriting, is obliged to go upon the hunt for other witnesses. In some instances, a witness for this purpose will be to be had without any additional expense. But this is altogether matter of chance; and for this single purpose it may be necessary to fetch a witness on purpose, at any degree of inconvenience to the witness, from any imaginable distance, and consequently at a proportionate expense. This expense rests ultimately on the shoulders of the party who on that side bears the burthen of costs. If the burthen of costs rested uniformly on the party who were in the wrong, even in that case this unnecessary expense would be a grievance: in case of *mala fides* indeed, it may have its use in the character of a punishment: but it would be a supposition by much too favourable to the intellectual character of the law, and by much too injurious to the moral character of the people, to suppose this to be the more common case. Nor yet does the burthen of costs rest, with any thing like uniformity, upon the party who is in the wrong, or even upon the party

whom the decision supposes to be in the wrong. So far from it, that, to distinguish the cases in which it shall rest upon the party who is supposed to be in the wrong, from those in which it shall rest upon the party supposed to be in the right, is a discussion that occupies the contents of a reasonable octavo volume.

The expense, which consists in the pecuniary allowance to the witness, added to that of the instrument of summons, with the lawyer's fees belonging to it, appears in pounds, shillings, and pence: but the delay and vexation, (not to speak of incidental and casual expenses, which may be the necessary accompaniments of the process of investigating by reflection and hunting out by inquiry a man's connexions, for the purpose of lighting on some person capable of proving his handwriting by the regular mode of proof),—all this put together forms a mass of inconvenience, which, though it cannot always be correctly expressed in pounds, shillings, and pence, is neither the less real nor the less heavy.

When the sort of witness in question, or one who is thought to be such, or pretends to be such, has been hunted out, the prize may but too easily turn out to be no better than a snare, and a source of miscarriage. The suitor whose misfortune it is to stand in need of such testimony, is thus rendered dependent upon the probity and prudence of an individual more or less likely to be in connexion with the adversary. In case of non-appearance, the witness is, indeed, answerable in damages. Be it so: but suppose the property at stake an affair of thousands, while a few hundreds or scores

would afford the witness a sufficient inducement to stand an action on that ground, or to take himself out of the reach of it? Suppose another modification of fraud, more simple and more safe. To a question put out of court, "can you prove such or such a man's handwriting?" the witness, who in fact cannot, answers, however, and purposely, in the affirmative. On the trial, he answers in the negative: the document, a necessary one (a note of hand, suppose), is set aside; and the cause is lost. What punishment? what remedy? Perjury, by the supposition, there is none; and for the falsehood out of court, there is no punishment.

The only sort of person to whom it is possible (speaking of suitors) to profit by the pretended tenderness of this rule, is the knavish and immoral suitor, who, being in the wrong, and knowing himself to be in the wrong, avails himself of the inability of the adversary to fulfil the conditions thus wantonly imposed upon him by the law; avails himself of this misfortune to obtain a triumph over justice. It is for the purpose of rewarding and encouraging the iniquity of one knave of this description, that the useless burthen above delineated is fastened upon the shoulders of perhaps a hundred suitors.

On the supposition of a perfect calmness as between the parties, seconded by an uncommon degree of intelligence as well as disinterestedness on the part of their agents, possible it certainly is for this source of delay, vexation, and expense, to be avoided: mutual and amicable explanations having taken place, the party

whose handwriting is in question agrees to admit it at the trial. All this is a possible case: but is it the most common case? Let experience declare. Not that so much as the possibility extends beyond that class of cases which are ranked under the head of civil cases; in cases called penal, any such sacrifice to truth is altogether out of the question.

To the list of the uses rendered to justice by this best of all evidence, corresponds the list of the mischiefs produced by the exclusion of it: promoting, in two distinguishable ways, misdecision and failure of justice; making a factitious addition to the natural and necessary quantities of delay, vexation, and expense.

To these mischiefs may be added another, the opposite of which could not so conveniently have been presented under the head of *uses*: I speak of the poison continually infused by the exclusionary rule into the moral branch of the public mind.

Hold the virtues of veracity and sincerity in contempt or detestation: look up to mendacity and insincerity as your strong holds, the pledges of your security. Look upon the license of exercising them as the boon for which you are indebted to the mercy and loving kindness of the man of law. Hold nothing for base and mean, that promises to preserve you from the obligation of rendering justice,—from the anti-religious and hell-born rules, *do as you would be done by, repent and suffer for your sins*. Hold nothing for base and mean,—or, holding your heads high, and speaking in a tone of firmness and defiance, main-

tain, that to practise whatever is most base and mean is among the Englishman's most honourable privileges. Deny your own handwriting in so many words,—or, denying it in deportment as significative as words, refuse or forbear to recognize it: deny your written words; and when a question is put to you by words spoken, keep your lips close, lest the truth should make its escape, and justice be done.\*

Such is the exhortation which the exclusionary rule never ceases to deliver to the people. Such is the lecture delivered by the judge, by every judge, as often as he marks with his approbation this flagitious rule.

A man who, uninvested with any coercive power, should, in the character of a moral instructor,—of a schoolmaster, a lecturer, or

\* Two young lawyers,† members of a volunteer corps, have incurred penalties: their names stand upon the muster-roll. Convened before a magistrate, the delinquency is proved upon them: they are acquitted notwithstanding. Why? Because their signatures cannot at that moment of time be proved. All this while, they are upon the spot, capable of being interrogated, had law permitted: but it is the boast of English lawyers, and of men duped and corrupted by English lawyers, to turn aside from truth thus discovered, with a degree of abhorrence such as no falsehood could provoke. So universal is the corruption, that this subterfuge, this negative act of meanness, was thought worth committing by these young lawyers to save 17s. 6d., but is spoken of by the newspaper reporters without the least symptom of disapprobation. Here we have the corrupted: but where are we to look for the corrupters? Among the judges, whoever they were, to whom the demon of chicane is indebted for the establishment of this rule.

† Morning Post and Morning Chronicle of Nov. 18, 1803.

a divine,—stand up and say to his auditors, “If a man with whom you have a difference happens to have in his hands a letter or memorandum of yours that you apprehend would make against you, deny it,—do not own it,—put him to the proof of its being yours; and if he is not able, triumph over him as if he were in the wrong;”—if it were possible that a man without power for his protection should take upon him to preach such doctrines, he would be abhorred, and not without reason, as a corrupter of the public morals. What, then, shall be said of those by whom such baseness is not simply recommended, but efficaciously rewarded? Men sow vice, and then complain of its abundance! The same hands which are every day occupied in thus planting and propagating mendacity, are as constantly lifted up against it, and employed in punishing it.

The above is not the only mode in which this superstition is a source of corruption to public morals. It is from the wanton sacrifice thus made of the purest evidence, that the field of justice is regularly inundated by the foulest and most polluted. To save one malefactor from the vexation of returning answer to unpleasant questions, the answer of a no less guilty malefactor is purchased by impunity, crowned with rich remuneration. Among partakers of the same crime, a gang of burglars, murderers, or incendiaries, *ille crucem pretium sceleris tulit, hic diadema*: and the order of things which, among the corruptions of ancient Rome, is painted by the poet as the summit of injustice, is, in the eternally-vaunted law of

modern Britain, become the ordinary course of what goes by the name of justice.

Thus it is, that, to the punishment of one confederate in a knot of malefactors, the nourishment and encouragement of another is become a condition almost inseparable.

And to this, together with certain other superstitions alike adverse to the interests of morality and justice; to this and those together, it is to be ascribed, that,—whereas in other countries the arts of depredation are carried on only by fits and starts, upon the spur of an occasional temptation, by here and there an unconnected and unsupported individual,—in England they are carried on professionally and systematically, by associations of malefactors, bound together in the ties of partnership, in bands now and then thinned, never extirpated, under the eye and with the protection and encouragement of the three constituent branches of government, the judicial, the executive, and the legislative.

Out of the same root grows that system of remuneration, which renders it an act of improvidence, on the part of the subordinate ministers of justice, to remove a scholar in the school of depredation before he has risen to the head of it; to fasten upon a pilferer, till he has ripened into a burglar; to take at 10*l.* a prisoner, who by a little forbearance might have yielded 40*l.*: just as, among renters of fish-ponds, it would be bad husbandry to take a pike of five pound weight out of a pond, in which he might have thriven on to ten pound.

SECT. II.—*Causes of the exclusion of self-criminative evidence.* 1. *Interests of criminals and other evil-doers.* 2. *Interests of lawyers.*

IN seeing the mischiefs entailed by this rule upon the community at large, we see its uses to criminals, delinquents, *mala fide* defendants, extortious and oppressive plaintiffs; in a word, to evil-doers of all sorts and sizes. Moreover, in seeing the persons to whom it is of use, the persons whose sinister interests are served by it, we see the hands and the hearts that stand pledged for its support.

In speaking of the taxes on justice,\* it was mentioned as one of the unfortunate characteristics of this species of tax, that, though of all taxes, actual or possible, the most burthensome, and in every respect the worst, it was not in the nature of it to find opponents: because the body of litigants (if a body it could be called), being ever fluctuating, and essentially split, was, to the purpose of mutual support, and opposition to extrinsic pressure, no better than a rope of sand: and, what is more, were the body itself ever so well knit together, it would still be but a body without a head. The tax, therefore, uniting in itself these two unhappily-conjoined properties, viz. that of producing the greatest possible quantity of misery to the people, and the least possible quantity of opposition and uneasiness to the man in office, the result was but too obvious. Relief was hopeless, unless the moment (per-

\* Protest against Law Taxes.

haps an ideal one) should ever arrive, that should produce a financier to whom the most important interests of the people should be dearer than his own momentary ease.\*

In the present case, the tables are unhappily reversed. Throughout the whole substance of the community extends itself, like the *tænia* in the natural body, a cluster of internal enemies, possessing, amidst whatever other diversity of interests, the common sinister interest urging them to behold their security in whatever arrangement contributes to weaken the efficiency of the law. The rule in question, being (as we have seen) a capital article in the list of debilitatives, will naturally be the object of a proportionate degree of attachment to the body thus composed. To the body of litigants, besides being divided against itself, there is no head. The body of delinquents (including those who, for having the law on their side, are but so much the more mischievous) find a regular and irresistible head in the man of law : in him who, during the sleep or fascination of the legislator, possesses and exercises all the authority of the legislator, though without the responsibility or the name.

With all its blemishes, the aggregate body of the laws having more in it of that matter which is beneficial to all men, than of that which is prejudicial to this or that one ; it is more (it may be said) for the advantage of the whole community taken together, that the force of the aggregate body of the laws should be at its maximum, than that it should stop short at any

\* That time is happily come —*Editor*.

inferior degree. True; if the interest of all were understood by all to be exactly as it is, and felt in proportion as it is understood. But (such is man's nature), a slight interest coming home to his own bosom, and presenting itself in distinct colours, will act on him with greater force than a much stronger one, common to himself with others, and viewed at an indeterminate distance. Whosoever, on any special account whatsoever, regards himself as obnoxious to the adverse pressure of the laws, will behold in the weakness of the laws, and in every institution that presents itself as contributing to the weakness of the laws, the means of safety. The advantage depending on the protection afforded to him by the laws against a crowd of possible injuries not presenting themselves individually to his view, will, in comparison with this conspicuous and distinct advantage, act upon his mind with very inconsiderable force. The smuggler, the official peculator, and the political malcontent, would each of them find, in a regulation which should cure any of the weaknesses of the law, an increased security against whatever mischiefs he stands exposed to, at the hands of the common herd of malefactors: but, the more distinct and nearer the danger with which he might conceive himself threatened by the influence of the same remedy, the more apt would the new security be to present itself as far from being worth to him the price which he would have to pay for it. Profit, the difference between the old and the new security against depredation at large: loss, to the smuggler, his

livelihood; to the peculator, his ill-gotten gains; to the political malcontent, the object of his plots.

The anxiety to preserve the body of the laws from being cleared of these debilitating poisons, will, according to circumstances, display itself with particular force, sometimes in the inferior, sometimes in the superior classes. When, in a criminal cause, the station of defendant was occupied by John Wilkes, the vilest quibbles that ever issued from the lips of depredation under the mask of justice were revered as oracles.

In a mixed constitution like the British, by some odd turn in the wheel of fortune it will now and then happen, that, among a multitude of secret or unnoticed instances of official delinquency, some one shall be unfortunate enough to become the subject of prosecution. On such an occasion, that the defendant (how clear soever his guilt) should find one at least of two parties zealous in his support, is a matter of course. Here, then, the debilitating poisons above spoken of become the object of eulogy and attachment in the highest circles. If those that have been compounded for past exigencies present themselves as sufficient for the present turn, they are made the most of, and no others looked for: if, in the *pharmacopæia politica*, no remedies of this class, as yet upon the list, promise to come up to the purpose, others must be made up: *inveniam aut faciam*; such is the alternative.

A revolution in administration, it may be said, offers a chance for justice: since, by

motives congenial to those by which one party stands engaged to undermine, an opposite party and that, for the moment at least, the stronger) stands engaged to defend, the foundations of justice. But, unfortunately, the incentives which animate the assailants are apt to be neither so universal, nor so strong in their operation, as those which animate the defendants: for, at the bottom of this momentary interest, thus salutary to justice, there exists a common interest (and that a paramount one), by which transgressors of all parties are linked together in an interest opposite to the interests of justice. It is to the advantage of all men who partake, or hope to partake, in the sweets of administrative power, that the laws by which they, and men in their sphere, have made a show of binding themselves, should, in every thing but shew, be as near as possible to a dead letter.

If, under such a constitution, it should at any time happen, that of the two contending parties each should contain a delinquent whose delinquency had been flagrant enough to attract public notice; it may be imagined how generally dear to all public men every institution would be, that was seen to act as a sedative upon the force of justice,—how strong and general an aversion would await any remedy that *promised* (shall we say, or *threatened*?) to render to the arm of justice its due tone.

Under such a constitution, a natural, not to say a necessary, consequence, is, that the course of procedure, so long as it has jurisdictional law for its guide, should swarm with rules, which, without contributing in any degree to the protection of innocence, should, by the

protection they hold out, afford in a variety of ways an efficient encouragement to delinquency and injustice. Of the rules thus made, made especially on that level, to be assured of their being directed to ends other than the end of justice, a man needs no more than to observe the place *in* which, in conjunction with the occasion *on* which, they are made. The occasions on which they are made are uniformly of the number of those in which, men's individual interests being at stake, and their affections heated, they find themselves, while in the state of parties, called upon to make laws for the guidance of their own conduct in the character of judges.

The same minds, whose partialities, excited by the incidents of the moment, render them no less unfit than the grossest corruption would do, to act with the authority of a legislator in the station of a judge,—these same minds, when free from the disturbance produced by the sinister interest of the moment, may, without any departure from the rules of moral probability, be expected to join with fidelity and concord in the pursuit of that general interest by which the line of public duty is prescribed.

Witness the Grenville Act: so fair and efficient a step in the improvement of that political constitution, the praises of whose excellence are so generally excessive, and beyond, to the most exorbitant extent, its merits; but of which this may with justice be said, and of much importance it is to be deemed that it can so with justice be said; the British constitution forms a basis for building those improvements which would terminate in a perfect government,—a

basis the firmest by far that ever was presented by any government that had existence upon earth.

In seeing the uses of the exclusionary rule to malefactors and evil-doers of all descriptions, we have seen its uses to the man of law.

Whatsoever is seen to diminish the security against misdecision and failure of justice, and thence whatsoever is really productive of that effect, is subservient to the interest of the man of law. In the minds of transgressors and *malâ fide* suitors, it helps to fortify the opinion, that no cause whatsoever, no cause, however bad, ought to be given up as desperate. Subsequently to transgression, in the minds of those who have already transgressed, it operates as a premium for dishonest defence or dishonest demand, as the case may be : antecedently to transgression, on all minds exposed to temptation (that is, in a word, on all minds) it operates as a premium for transgression, for injustice, in every shape.

The vexation, expense, and delay, so frequently attached to the production of the inferior evidence resorted to on the exclusion of the most satisfactory species of evidence, have just been brought to view. On this occasion as on all others, lawyer's profit being both cause and effect of that triple-headed mischief, the use which the exclusionary rule is of to the man of law is self-evident.

By the vexation, expense, and delay, it adds to the quantity of lawyer's profit in each cause separately taken : by the chance it affords of misdecision or failure of justice for want of the

excluded evidence, it adds to the encouragement given for dishonest defences and demands, and thence to the number of the individual sources from which that pernicious profit may come to be derived.

Meantime, although to lawyercraft, and the benefit derived from this rule by Judge and Co., the principal share in the establishment of it may be to be ascribed; what cannot but be admitted, is, that, to the production of this effect, circumstances of a different and more laudable complexion would probably be found to have been not altogether without their influence, in the character of co-operating causes. 1. Tyranny of the times; anxiety, and (on the ground of public utility) real need, of saving, at any price, the precious few who were at the same time able and willing to stand in the gap. 2. Multitude and extent of bad laws, the result either of improbity or folly. 3. Savageness of the people in general, and of the fraternity of lawyers in particular; propensity on their part to fasten upon an innocent man, and (especially if, on any particular account, whether political or personal, obnoxious) to treat him as, under the lash of cross-examination, by hireling advocates, under the eye of careless or approving and abetting judges, men are but too frequently treated in the character of extraneous witnesses: to fasten upon him, and, by intimidation and misrepresentation, to wring out of venial infirmity the appearance of criminality, sometimes even the appearance and colour of delinquency out of the purest innocence.

SECT. III.—*Pretences for the exclusion.*

1. At the head of every thing which, with or without the name of a reason, has been advanced, or is capable of being advanced, in the view of securing the attachment of the people to the exclusionary rule, let us place the old sophism, the well-worn artifice, sometimes called *petitio principii*, and which consists in the assumption of the propriety of the rule, as a proposition too plainly true to admit of dispute.

In the minds of some men, (not to say the bulk of men), if you set about proving the truth of a proposition, you rather weaken than strengthen their persuasion of it. Assume the truth of it, and build upon it as if indisputable, you do more towards rivetting them to it than you could do by direct assertion, supported by any the clearest and the strongest proofs. By assuming it as true, you hold up to their eyes the view of that universal assent, or assent equivalent to universal, (dissenters being left out of the account), which, from your assumption, they take for granted has been given to it: you represent all men, or (what comes to the same thing) all men whose opinions are worth regarding, as joining in the opinion: and by this means, besides the argument you present to the intellectual part of their frame, you present to its neighbour the volitional part another sort of argument, constituted by the fear of incurring the indignation or contempt of all reasonable men, by presuming to disbelieve

or doubt what all such reasonable men are assured of.

For exemplifications of the use of this instrument of persuasion, of the application of it (I mean) to the present purpose, it is altogether useless to make reference to this or that particular book or books: you hear it in all discourses; you see it, as often as occasion serves, in all books and in all newspapers.

2. The old woman's reason. The essence of this reason is contained in the word *hard*: 'tis hard upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do any thing that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to, is, his being punished. What is no less hard upon him, is, that he should be punished: but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself: with this difference, that when he is punished, punished he is by the very supposition; whereas, when he is thus made to criminate himself, although punishment may ensue, and probably enough will ensue, yet it may also happen that it does not.

What, then, is the hardship of a man's being thus made to criminate himself? The same as that of his being punished: the same in kind, but inferior in degree: inferior, in as far as, in the chance of an evil, there is less hardship than

in the certainty of it. Suppose, in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his own mouth that the evidence is to come, or out of another's?

To this, to which, in compliance with inveterate and vulgar prejudice, I have given the name of the old woman's reason, I might, with much more propriety, give the name of the lawyer's reason. When a child has hurt itself, and a chirurgical operation is deemed necessary for its cure, it may be that here and there an old woman may be found weak enough to exclaim, Oh the poor dear child! how it will hurt the poor dear child! how *hard* it will be upon the poor dear child! and so on; no, it sha'n't be doctored. It would be too much to say that such old women do not exist; but sure enough they would not, in any very considerable number, be very easy to be found.

But the lawyer, in disposing of the fate of those who, if they were in any degree dear to him, would not be dealt with by him as they are, has never,—let us not say any *other*,—at any rate employs scarcely ever any *better* style of reasoning. The reasons most plenty with him, the only reasons that are not rare, are *technical* reasons. The reasons that with him are choice and rare, the reasons brought out only now and then, are these old women's reasons: reasons consisting in the indicating, out of a multitude of reasons standing on each side, some one only on one side.

Nor yet is all this plea of tenderness, this double-distilled and treble-refined sentimentality, any thing better than a pretence. From

his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple: so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection, a confirmed and most extensive predilection, for bad evidence: for evidence, the badness of which you yourselves proclaim, and ground arguments and exclusions upon in a thousand cases.

What every man knows, and what even yourselves, in spite of all your science, cannot be ignorant of, is,—that, of all men, the man himself is the last man who would willingly speak falsely to his own prejudice; and that, therefore, against every man, his own is the safest, the most satisfactory, of all evidence: and it is of this best and most trustworthy of all possible evidence, that your pretended tenderness scruples not to deprive the interests of truth and justice!

You know of such or such a paper; tell us where it may be found. A request thus simple, your tenderness shudders at the thoughts of putting to a man: his answer might lead to the execution of that justice, which you are looking out for pretences to defeat. This request, you abhor the thoughts of putting to him: but what you scruple not to do (and why should you scruple to do it?) is, to dispatch your emissaries in the dead of night to his house, to that house which you call his castle, to break it open, and seize the documents by force.

Not that, in any such act of violence, considered as a necessary means to a necessary end, there is any thing to blame: it is on the

score of inconsistency, and that alone, that it is here worth mentioning. Two means to the same end : the one violent, the other free from violence. The quiet one is too violent for you : you embrace the violent one ; and not only in preference to the other, but to the exclusion of it : and this is your delicacy, your tenderness.

It is not however true, that, even as towards criminals, if taken in the *aggregate*, the plea of humanity can be pleaded in behalf of this rule, consistently with truth. Humanity? yes, viz. the word: for as to the thing itself, if effects be considered (howsoever it may be with regard to motives and intentions), in any practice grounded on any such rule it is no more to be found than the thing called *justice*.

Of the man who, with the word humanity in his mouth, calls for this or that thing to be done, the expectation (if there be any determinate expectation) is this, or nothing, viz. that, supposing the course thus recommended by him pursued, the consequence will be, that, upon the *aggregate* number of offenders who for the offence in question will have suffered within a given length of time, the aggregate quantity of suffering undergone will be less, than it would have been had the course pursued been the opposite.

But, of any such rule as that here in question, the necessary effect (in so far as it has any) is, not to lessen that aggregate quantity of suffering, but to increase it. By whatsoever cause the ratio of the number of known, but yet unpunished, to the whole number of known, offenders, is increased ; in that same ratio, the known and apparent probability of punishment

(in the eyes of a person having it in contemplation to engage in the commission of an offence of that sort) is diminished. But, on the mind of any given person, to produce, by means of punishment, an impression of any given degree of strength and efficiency, in proportion as the probability is diminished, the magnitude must be increased. In playing at cards or dice, in buying and selling a life-annuity, or a post-obit, there is not a proposition more incontestable.

Be the offence, be the punishment, what it may: in proportion as you exclude this or that quibble, this or that device of technical procedure, by which a certain proportion of the whole number of delinquents are saved, and the probability of punishment in case of delinquency thereby diminished, you would put it in your power to make a correspondent and proportionable reduction in the magnitude of your punishment.

What is the same thing in other words; it is because your law is so full of quibbles, exclusionary rules, and other points of practice, by which impunity is given, and seen to be given, to known delinquents, that (the probability of punishment being subjected to constant diminution) delinquency receives proportionable increase: and, for combating it, the only other resource remaining, and the only resource that a quibble-loving lawyer will endure to hear of, is an increase of the magnitude of the punishment. To make sure, and do at once all that can be done, the punishment which on every such occasion he runs to in preference, is the punishment of *death*: death, simple death, as being, though not the highest and most impres-

sive which human nature is capable of being subjected to, (since afflictive death, death accompanied by torture, might, to an indefinite degree, be made higher), the highest, however, which, in this age and country, men in general would endure the mention of.

Under the influence of such humanity, this, then, is the sort of *repetend* that takes place. By the generation and application of penal law quibbles, and of impunity-giving rules, a demand (real or supposed) is produced for addition to the magnitude of the punishment: an addition, and in each case (sooner or later) *such* an addition, as consists in substituting to the last antecedently-established punishment (be it what it may), the punishment of death. But, by the increase given to the application of the punishment of death, increase is at the same time given to the propensity and the pretence for the application of other quibbles, and other impunity-giving rules.

Under this system, that which consistency would require, (not that, with such humanity, any sort or degree of consistency is compatible), is, that for offences of all sorts there should never be any other than one sort of punishment, and that one sort death: for, so long as quibbles are in honour, and applied to delinquency in every shape, delinquency, till the punishment be raised to this its maximum, will go on increasing. Thereupon comes the argument. "Against the act in question there exists a law, by which it is converted into an offence: to this offence a punishment stands annexed, and, this punishment notwithstanding, it was but the other day that an offence of this sort was

committed. This punishment is not so great as the punishment of death: substitute to it the punishment of death: and thereupon, if the repetition of the offence be not less frequent than of late years it has been, at any rate the utmost will have been done that can be done towards rendering it so." This is exactly what, sooner or later, may be said of every offence that ever has been, or can ever be capable of being, committed: and as often as the punishment of death has been proposed to be substituted to the previously-established punishment, more than this never has been said; more than this has never been regarded as necessary to be said; more than this, in substance, has never been capable of being said.

Thus it is, that to one and the same individual, to one and the same weak-minded and narrow-minded, the same half-bigot half-hypocrite lawyer, it belongs to be fond of quibbles, and at the same time to be fond of death: in regard to death, understand, of course, to be fond, not of suffering it, but of causing it to be suffered: to be suffered, or, if not suffered, threatened; and that under such management, as, by causing it not to be expected, causes the threat not to be productive of the effect pretended to be aimed at.

Such is the genesis of lawyercraft: death begets quibbles, and quibbles beget death: inflicted or not inflicted, when death is threatened, the quiver of lawyercraft is exhausted: perfection, all that is practicable in perfection, is supposed to have been attained.

Under such treatment, the disease either receives positive increase, or at least does not

receive any thing like that relief which, under a more rational treatment, might have been afforded. In either case, the mode of treatment fails; but the failure is of course ascribed, not to the unskilfulness of the physician, but to the perversity of human nature.

What cannot but be admitted is, that, by the effect of this impunity-giving rule, undue suffering has probably in some instances been prevented. Prevented? but to what extent? To the extent of that part of the field of penal law which is occupied by bad laws: by laws which prohibit that which ought not to have been prohibited, or command that which ought not to have been commanded.

But, in the character of a remedy against the mischief of which such bad laws are productive, observe the nature and effect of this rule. Applying with equal force and efficiency to all penal laws without distinction, to the worst as well as to the best, it at the same time diminishes the efficiency of such as are good: while it is only by accident, and to an amount altogether precarious and unascertainable, that it does away the mischief with which such as are bad are pregnant.

Bring up a good field-piece, or, if that be not sufficient, a four-and-twenty pounder; load it with grape-shot; station it at either end of any one of the bridges; and at any convenient hour about the middle of the day, but without letting it be known what hour, fire it off as many times as may be deemed necessary and sufficient. Doing this, you will do, in furtherance of justice, exactly what, in manifestation of humanity and mercy, is done by nullification

*in penali*, by exclusion of what is called *self-accusing* evidence, and by whatever other rules and principles there may be, which present the like title to the appellation of *impunity-giving* institutions.

Not that, if that sort of humanity were in question which consists in the preservation of the innocent, the service done by these institutions to humanity would be any thing like so great as the service which, by the field-piece or the four-and-twenty pounder, if well served (as above), would be done to penal justice. By the piece of ordnance, the number of killed and wounded must be small indeed, if among them were not found, in some proportion or other, individuals whom, in some instance or other, the penal system had had cause to place upon the list of its transgressors. By the principle of nullification, or the rule which excludes self-criminative evidence, not only are the guilty served, but it is they alone that are served: they alone, and without any mixture of the innocent. For when, though unfortunate enough to have become the object of suspicion, a man is really innocent, does he fly to any of these subterfuges? Not he, indeed, if character be of any value in his eyes; for, by recourse to any of them, what is no secret to any body is, that so sure as punishment is escaped, character is sacrificed.

3. The fox-hunter's reason. This consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsmen. The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law*: leave

to run a certain length of way, for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as *unfair* as convicting him of burglary on a hen-roost, in five minutes' time, in a court of conscience.

In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end: a certain quantity of delay is essential to it: dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it.

In the case of the fox, there is frequently an additional reason for fair play. By foul play, the source of the amusement might be exhausted: the breed of that useful animal might be destroyed, or reduced too low: the outlawry, so long ago fatal to wolves, might extend itself to foxes.

In the mouth of the lawyer, this reason, were the nature of it seen to be what it is, would be consistent and in character. Every villain let loose one term, that he may bring custom the next, is a sort of a bag-fox, nursed by the common hunt at Westminster. The policy so dear to sportsmen, so dear to rat-catchers, cannot be supposed entirely unknown to lawyers. To different persons, both a fox and a criminal have their use: the use of a fox is to be hunted; the use of a criminal is to be tried.

But inasmuch as, in the mouth of the lawyer, it would be telling tales out of school; from such lips this reason must not be let out without disguise. If let out at all, it must be let drop in the form of a loose hint, so rough and

obscure, that some country gentleman or other, who has a sympathy for foxes, may catch it up, and, taking it for his own, fight it up with that zeal with which genius naturally bestirs itself in support of its own inventions.

4. Confounding interrogation with torture: with the application of physical suffering, till some act is done; in the present instance, till testimony is given to a particular effect required.

On this occasion, is it necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness? Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness), that, if any thing he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. This condition, essential in the case of an extraneous witness, is not equally so in the case of a party in the cause; since a party, by being such, stands exposed to a sort of punishment intrinsic to the cause, viz. the loss of the cause: as where a defendant, in consideration of false responson, evasive responson, or obstinate silence, is concluded to be guilty: a punishment, of which an extraneous witness, not having any interest at stake in the cause, is not, on that occasion at least, susceptible.

The curious part of the story is, that the same sort of persons by whom the identity of a question and a thumbscrew is thus dreamt of,

or affected to be dreamt of, are commonly the same persons who, when torture is actually applied, and applied to the worst of purposes, that of forcing juries to commit a useless perjury, are delighted with the operation, and proclaim aloud that every thing is better than well.

5. Reference to unpopular institutions.

Whatever Titius did was wrong : but this is among the things that Titius did ; therefore this is wrong : such is the logic from which this sophism is deduced.

In the apartment in which the court called the Court of Star-chamber sat, the roof had stars in it for ornaments ; or else certain deeds to which Jews were parties, and by them called shetars or shtars, used to be kept there ; or, possibly, there being no natural incompatibility, both these facts were true. Whether it was owing to the gilt stars, or to the Jew parchments, the judges of this court conducted themselves very badly : therefore judges should not sit in a room that has had stars in the roof, or in a room in which Jew parchments have been kept. Had the conclusion been in this strain, the logic would not have been very convincing, but neither would the mischief have been very great.

In the High Commission Court, the judges sat and tried causes in virtue of a commission : and they too conducted themselves very badly : therefore judges ought not to be appointed by a commission. The logic, though not less rational than in the preceding case, begins to be rather mischievous. Not to be appointed by a commission ? How, then, should they have

been appointed? But perhaps the commission was too *high* a one. When a judge conducts himself as he ought to do, the parchment of the commission he acts under is not above three foot high, when unrolled and set up on end: but here it was four foot. The logic wants nothing of being upon a level with what one usually sees in law-books; but still, something is yet wanting to enable it to impress conviction on a fastidious mind.

The Inquisition (meaning the true inquisition, of the Spanish sort), that used to work with such success in the extirpation or conversion of heretics, was a court in which it was the way of the judge to inquire into the business that came before him: to put questions to such persons as, in his conception, were likely to be more or less acquainted with the matter: and this, whether extraneous witnesses or parties. Now this it is, that was and is a most wicked and popish practice. Judges ought not to put questions: be the business what it may that comes before them, it ought to be the care of judges never so much as to attempt to see to the bottom of it. Here, then, we see the true source of all the odium; viz. not merely of that which has attached itself to this abominable court, but of that which attached itself to those other abominable courts. It was not by sitting in a room with stars or parchments in it: it was not by acting under a commission too high in itself, or that lay on too high a shelf; it was not by either of these causes that the two English courts, held in such just abhorrence by all true Englishmen, were rendered so bad as they were, — but by their abominable practice of

asking questions, by the abominable attempt to penetrate to the bottom of a cause.

*Non-Lawyer.* But we in England,—have not we had formerly without complaint, and might we not have still, our inquests of office? Have we not still our grand inquests, and our coroner's inquests, and our courts of inquiry, and our committees of inquiry, and our commissions of inquiry, and our commissioners of inquiry; and are not they, some of them at least, very good things?

*Lawyer.* O yes: but then, if they inquire, they do it in the way of inquest or inquiry only, not in any inquisitorial way:—that is (observe of course), not to put troublesome, vexatious questions, such as would make a man accuse himself: in short, whatever the business be, not to get to the bottom of it. This, at least, is among those things which they ought not to do: for to sooner do they make any such attempt, than they become inquisitors; popish, Spanish inquisitors, or worse: and those who, had the truth come out against them by other means, would have been convicts, become innocent and persecuted men; victims, or intended victims, of persecution, tyranny, and so forth.

Of the Court of Star-chamber and the High Commission Court taken together (for to the present purpose they are not worth distinguishing), the characteristic feature is, that, by taking upon them to execute the will of the king alone, as made known by proclamations, or not as yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one. In the case of the High Commission Court, the mischief was aggra-

vated by the use made of this arbitrary power in forcing men's consciences on the subject of religion. In the common law courts, these enormities could not be committed, because (except in a few extraordinary cases) convictions having never, in the practice of these courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these innovations, the attempt to get the official judges to carry prosecutions of the description in question into effect, presented itself as hopeless.

In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? If, then, in the ordinary courts of law, the practice with respect to the admission of this source of information was wavering, or the opinion of the profession hesitating, nothing could be more natural than that the observation of the enormous mass of mischief and oppression to which it was continually made subservient, should turn the scale. Of this instrument in the hand of justice, or of persons in the place of justice, what was the characteristic property? Its sharpness. But at that particular conjuncture, employed as it was employed, its usefulness, great and pure as it would have been in other

times, was converted entirely into mischief: its virtue was spent in the giving energy and efficiency to a system of operations hostile to the security and happiness of the body of the people. In those days, the supreme power of the state was *de facto* in the hands of the king alone: for as to that of parliament, it had never been any thing better than a contingency; and in those days it was a contingency which it was intended, by those on whom it seemed to depend, should never happen: the improbability of its happening, must in those days, in the view of every body, have been extreme. The king's power, then, was *de facto* absolute: being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value,—every chance of safety depended upon the enfeeblement of it; every instrument on which the strength of that government in those days depended, every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium, which, could it have confined itself to the particular application then made of the instrument, and not have extended to the instrument itself, would have been no other than just, and reasonable, and well grounded.

As to the ecclesiastical tribunal called the Inquisition, a circumstance that seems not generally understood, is, that the procedure was little or nothing more than the ordinary procedure employed in the same countries in the higher classes of criminal cases.\* Bad as

\* As to the English Star-chamber and High Commission, used as an instrument for the discovery of truth, the

the practice was, what there was peculiar to it belonged, therefore, not to the adjective system, but only to the substantive laws (the laws against heresy) to the execution of which it was applied. Besides the close imprisonment and the practice of torture, which was common to both, there was indeed, in the forms employed by the ecclesiastical tribunal, a sort of theatrical exhibition, a sort of preaching to the imagination through the medium of the eye, beyond any thing that in that way has ever been applied to non-ecclesiastical offences. But

mode of inquiry (had the substantive laws for the execution of which it was employed been legitimate) was no other than that which in many cases (as hath already been observed) is essentially necessary to that purpose; I speak of the epistolary mode applied to defendants in the equity courts: and even where unnecessary, and inferior to the ordinary *viva voce* mode, would, in all cases, be a very advantageous substitute to that of which so great a use is still made in all the Westminster Hall courts, viz. the *affidavit* mode.

In the Star-chamber, the examination, instead of being performed in the epistolary mode, was sometimes performed *viva voce*, as at present in the preparatory examinations before justices of the peace: but as this unexpensive and more searching mode, how well soever it answered the personal purpose of the king, did not answer the purposes of the lawyers whom he found it convenient to employ as instruments, it was in comparison but little in use. (Powel's Attorney's Practice.) To the king's purpose, the procedure the best adapted would have been the natural and expeditious and searching procedure of the courts of conscience: to the purpose of his long-robed instruments, this unexpensive, and therefore to them unprofitable, mode, would have been altogether inapplicable; another mode there was that suited their purpose exactly, and that was the dilatory, scribbulatory, and profitably-expensive mode of the courts of equity. By the adoption of this amendment, the two objects were consolidated: the royal falconer, after a prolongation of the sport, got his prey; the hawks were rewarded with their portion of the entrails.

this, instead of reproach and odium, would, if viewed in the character of a means to an end, (abstraction made of the end) be considered as an exertion of ingenuity worthy of praise.

Are not Romish inquisitors men? Do not they eat and drink? Is that a reason why Protestants should do neither? In all courts, well or ill organized, in which justice, or what passes for it, is well or ill administered, must not there be a multitude of features in common? The business is, to distinguish the good ones from the bad; and where, upon the whole, the result appears vicious, to observe in what part of the legal system the defect lies, the substantive, or the adjective: whether the means employed are in themselves bad, or bad only in respect of the badness of the end.

If the ends pursued are mischievous, the means employed in the pursuit of them cannot, in so far as they are fit for the purpose, but be likewise mischievous. But upon which of the two objects, in this case, is the mischief to be charged? Not upon the means, surely, but upon the ends. Of the means, nothing more can rationally be required, than that they shall be such as shall not be productive of any mischief, other than that which results from their subserviency to the ends. If you are determined upon war, take care that it be not without good cause: but think not,—no man that ever acted in the character of a statesman ever yet thought, was ever weak enough to imagine, so much as in a dream,—that the strength of his army could ever take any thing from the goodness of his cause.

The perfection of a sword is in its sharpness:

the sharper it is, if employed against friends, the more mischief it would do: would this be a reason for discarding the use of sharp swords, and using none but what had been blunted? No! the dictate of reason is, let your sword be sharp, the sharper the better; but take care not to wound a friend with it.

In the hands of an assassin, as in the hands of a constable, an oaken staff will give a harder blow than a deal one: but on that account would it be reasonable to say, that, bulk for bulk, and shape for shape, an oaken staff was a worse weapon than a deal one?

What cannot be denied, is, that if it were possible to keep all oaken staves out of the hands of malefactors of every description, putting deal ones in their room, and giving to constables the exclusive use of oaken staves, the effect would be a desirable one. Pursuing the allusion,—to give the benefit of the admission of self-convicting evidence to him whose aim it is to give execution to bad laws, would be, it may be said, to take the deal staff out of the hand of the malefactor, and add to his power of doing mischief by the substitution of the oaken one. But there would be the greatest possible incongruity in saying, such and such laws shall not have the benefit of self-convicting evidence, such and such others shall. The laws to which this benefit is denied, are they good laws? then why put it out of your power to execute them? Are they bad laws? then why are they suffered to subsist?

Seeing the two descriptions of persons whose interest is served by the exclusion put upon this species of evidence, viz. evil-doers of all

sorts, and, under the technical system, lawyers of all sorts, in the character of their natural accomplices, partners, and abettors,—we see the two descriptions of persons in whom the exclusionary rule beholds its natural and indefatigable adherents, advocates, and supporters. But in the fraternity of lawyers, we behold the only persons who are in the habit of speaking, the only persons who, if their words are to be taken for it, ever are or can be sufficiently well qualified to speak, in the character of censors, in the way of approbation or disapprobation of any existing rule of law: the persons of whom, speaking of the matter of fact, it must be confessed (how much reason soever there is for wishing that it were otherwise), that it is of their voice that on this subject the public voice is composed.

Here then, considering the propriety of the rule as a question to be tried at the bar of the public, here is a question to be tried, and to be tried and decided upon scientific evidence: and the persons of whose testimony this body of evidence is composed, are all of them persons who, considered in the character of witnesses, speak under the bias of a sinister interest.

These self-hired witnesses, speaking thus by thousands, all of them in the same strain; and amongst them so many, each of whom is in possession (and in the continual exercise) of the faculty of giving that sort of official judicial testimony which has been rendered absolutely conclusive, no testimony on the other side being suffered to be delivered; can it be matter of wonder, if the judgment of the unbiassed

part of the public should by such a torrent be overborne and misled?

Again; can it be matter of wonder, if a non-lawyer, making, in the character of an occasional speculator, an accidental excursion upon this ground, upon ground lying thus within the acknowledged demesne of lawyers, should join without reflection in the cry, recognizing (as is so natural) in the unanimous suffrage of such a multitude of counsellors, the voice of truth, as well as the means of safety? And thus it is that in this, as well as so many other parts of the field of jurisprudence, the public voice is composed: the principal parts by a set of hired performers; the chorus by a band of dupes in the character of *amateurs*.

SECT. IV.—*History of the rule excluding self-criminative evidence.*

THE authorities on this subject present, as usual, darkness visible: but, where the subject presents nothing better, even to see that every thing is dark, is more satisfactory than not to see.

The earliest *dicta* which the industry of Viner could discover; are of no earlier a date than the thirty-second of Elizabeth. Here we behold, and for the first time, the maxim which, with its *variantes*, has since become so famous: *Nemo tenetur seipsum prodere*; in later times, *accusare*.

It presents itself in two almost contiguous cases: the first, according to the date given to it, is in the thirty-second year of Elizabeth, in

the Common Pleas; the report by Leonard: the other, in the thirty-second and thirty-third year of the same reign, in Michaelmas term, in the King's Bench; two reporters here, Cooke, afterwards judge, and Serjeant Moore.

In both cases, it was an impertinence: in both cases, the assertion conveyed by it was a notorious falsity. In the only case in which a decision appears to have been given, (for in the earliest, the Common Pleas' case, time was taken for decision, and none reported), the decision could not have turned upon the rule.

In both cases, the shape in which the cause came before the court was that of a motion for a writ of prohibition to be directed to the ecclesiastical court, on the ground of prætergression of jurisdiction: in both cases, the alleged prætergression consisted in sustaining a suit for incontinence, proceeding therein by an endeavour to examine the defendant upon his oath: in the court in which a decision was pronounced, the prohibition was granted.

But in that case the decision had no need of any such, or any other, general maxim, true or false. In any other sorts of causes than the two particularly specified (viz. matrimonial and testamentary), administering an oath to the defendant was a practice expressly interdicted to *that* court, by two writs that are still to be found in the *Registrum Brevium*; the book of the highest authority of any that compose the library of jurisprudential law.

Yet, in neither case is any intimation given of any reference, made by either court or counsel, to this most irrecusable of all authorities: neither in the case in which it was conformed

to, and the prohibition issued accordingly, nor in the prior case in which nothing was done. In this prior case, the reporter (Leonard) gives indeed a reference, but apparently as from himself; and then not to that authoritative repository of judicial documents, but to Fitzherbert's Commentary on it.

Being probably as yet without a precedent, the application that had been made to the inferior court, the court of Common Pleas; in the case above referred to, had produced nothing but doubts. The application thus made to the superior court, the court graced in intendment of law by the presence of the king *himself*, its subordinate having no presence higher than that of the *king*, without any such adjunct, to boast of, had a more successful issue. Heartened up by the authority and the Latin of her majesty's attorney-general, the great Sir Edward Coke, they pronounced boldly that no such *proditio* should take place.

Leaving out of the question technical and supernatural causes, and looking out for natural psychological ones, two present themselves as competent, one or both of them, to the production of this effect. One was, jealousy of the power of these spiritual rivals; another, a sort of personal and prudential apprehension of the lengths to which such impertinent curiosity, if unchecked, might extend itself, on ground of such peculiar delicacy.

1. In their anxiety to obtain custom, and to make the most of it when obtained, the courts of common law had concurred, in the manner above explained, in giving encouragement to mendacity, by exempting from the obligation of

an oath, and thence from the punishments (religious, moral, and at length political\*) attached to the breach of it, the testimony of parties for or against themselves. Equity, spying in this deficiency an inlet opened to successful rivalry, had taken upon herself to withdraw this license from the defendant's side of the cause, thereby giving to the plaintiff the till then unexperienced advantage of the defendant's self-disserving testimony. The jurisdiction of equity had not, however, ventured to extend itself beyond the civil class of causes, nor in that to the whole extent of the field of jurisdiction.

The advantage thus possessed by equity, one of the branches of English Rome-bred judicature, had all along been possessed by another branch, the ecclesiastical. But from some uncertain, though at any rate early period, a resolution had been taken by the common law courts, that the jurisdiction of the ecclesiastical courts, so far at least as it was to be enforced by the examination of parties upon oath, should not extend to any other causes than such as came under the denomination of testamentary and matrimonial causes. In the *Registrum Brevium*, a writ, accordingly, is to be found, in which the limitation thus put to the jurisdiction of these courts is assumed.† Moreover, Fitzherbert, in his *Commentary* on

\* In the Star-chamber, from the time of Hen. VII.

† *Registrum Brevium*, fo. 36. 6 tit. *Prohibitiones*.

Rex vicecomiti salutem. Præcipimus tibi quod	REGULA.
non permittas quod aliqui laici ad citationem talis	Prohibitio
episcopi aliquo loco conveniant: de cetero, ad	ne laici ad
aliquas recognitiones faciendum vel sacramentum	citationem
	episcopi con-

the *Registrum Brevium*, takes notice of this same limitation and these same terms.\* Not that the limitation has been adhered to in practice: for to this hour, the jurisdiction of those courts, together with the power included in it of taking such examinations as above, has a much wider range.

Ever since an early period of the reign of Henry VII., a court had existed, long known by the name of the Court of Star-chamber, (a court of criminal jurisdiction, and that to a vast extent), in which the power of examining the defendant upon oath had all along been exercised.†

During the whole of the reign towards the close of which the oracle was delivered, this court had been a busy one. In every one of the several reports, it is delivered in the form of a general or universal proposition; no exception, or intimation of any exception, being annexed to it. Taking it thus as it stands, it was, in respect of verity, exactly upon the footing of a proposition denying that the sun ever shone at noon-day.

At that time of day, the Court of Star-

*præstandum, nisi in casibus matrimonialibus et testamentariis. T. &c.*

Rex vicecomiti salutem. *Pone per vadium, &c. talem episcopum, quod sit coram justiciariis nostris, &c. ostensurus quare fecit summoverti, et per censuras ecclesiasticas distringi laicas personas, vel laicos homines et feminas, ad comparendum coram eo, ad præstandum juramentum pro voluntate suâ, ipsis invitis, in grave præjudicium coronæ et dignitatis nostræ regis, necnon contra consuetudinem regni nostri. Et habeas ibi, &c.*

*veniant ad recognitionem faciendam. Attachiammentum indè.*

\* Fitzh. Nat. Brev. p. 91. [41.]

† Ann. Dyer, 288: Easter, 12 Eliz.

chamber, though since abolished, rested upon as firm a foundation as any other of the courts: the decisions pronounced were as uncontested law, as those of any other court: in that character they are reported by all the reporters, indiscriminately with those of the several other courts. Being, under the tyrannical and extortionous reign of Henry VII., instituted to serve as a new and more powerful instrument of the crown, unclogged by juries, it was all along an especial favourite.

Against the power of such a court, a power the exercise of which was every day's practice, it may be imagined of what use or avail could be this or any other proposition, though couched in ever such good Latin, denying the existence of it.

The oracle is of the rhetorical cast, which is as much as to say, in the natural style of oracles: and having, as it was probably designed to have, any one of half a dozen meanings, whichever happens to be most convenient to the purpose, it is in proportion guarded against the misfortune of seeing its truth disproved. But if the import of it be, that no question shall be put to a man, the answer of which, if true, may tend to his conviction, the truth of it stands further disproved by the then and still existing every day's practice of another sort of court. I speak of the court established by the statute of Philip and Mary, the court consisting of a single justice or any number of justices of the peace, for the purpose of taking the preparatory examination of the defendant and others, antecedently to the trial by jury, in the case of felonies. At the institution of this

preparatory judicature, the Star-chamber, with its practice of examining the defendant, being in full vigour, and no restrictive direction given, what could be the intention of the legislature but that the mode of examination pursued every day in the Star-chamber (not to speak of the nursery-chamber, and every other room in which common sense was listened to) should be pursued? The examination of the supposed felon was to be taken: but to what end take his examination, or the examination of any other person, but to find out the truth, meaning, of course, the whole truth? "The evidence you shall give, shall be the truth, the whole truth, and nothing but the truth:" such is the direction given, probably at that time, certainly at the present time, to every sort of person when examined in the character of a witness. What reason for supposing it so much as possible, that, in the reign of Philip and Mary, when (in imitation of the course which the retainers of the Spanish monarch had seen pursued all over Europe) direction was given for extracting the testimony of the defendant, any wish so silly should have been entertained as that so much of the truth as should tend to his conviction, that is, to the only direct end and object of the suit, should be left out of it?

Oh! but (says somebody) the practice actually is, under this act, to be cautious of extracting from the defendant any testimony the tendency of which may be to his prejudice; and even, lest any such testimony should escape him unawares, to give him warning to keep his lips well closed. I can very easily

believe it : viz. so often as, and no oftener than, in the eyes of the examining justice, the general praise of humanity, and the popularity to be gained by it, is of more value to him than the advantage, public and personal, attending the discovery of the truth in that individual instance. But the question at present is, not what is the practice of modern times, but what was the practice of those early times ; viz. in the reign in which this effusion of learned rhetoric is first known to have made its appearance ? To understand this, if it be worth understanding, turn to the State Trials ; turn to the case of Udal, the puritan minister,\* prosecuted and teased to death, in the style of the Spanish Inquisition, in those days of supposed English liberty. Observe there eight personages, and among them two peers and great officers of state, a bishop, a chief justice of the King's Bench or Common Pleas, the chief justice taking the lead (between three and four months before the emanation of this writ), all pressing him, urging him by threats and promises to take an oath, for the purpose of having his testimony extracted from him : he saying that he had already been punished upon such testimony, and (that he might not fall into the same scrape again) declining to take the oath.

The guilt imputed consisted in the writing and publishing of a book, in which the truth of his religious persuasion was maintained. Assuming this to be guilt, his guiltiness is out of all dispute : in the relation we have of the proceedings (for it is his relation) he avows it.

\* State Trials, vol. i. pp. 167—188 : 32 Eliz. July 24, 1590.  
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What evidence more satisfactory could have been given of it, than his inability to deny it with any prospect of success? Here, then, was no injustice: of what injustice there was (and sure enough there was no want of injustice), the seat was in the substantive branch of the law: it consisted in the converting into a capital crime the act of him who makes known, to use the words of Scripture, "the reason of the faith that is in him."

Thus, then, is it with this famous aphorism: at the time when first delivered, it was sent out in diametrical opposition to notorious truth. But having once found its way into the books, there it lay *in petto*, in a dormant state, ready, under a favourable set of existing circumstances, like a fly bottled up in spirits, to be revived at any time. When first brought out to view, we have seen it in the condition of "the stone which the builders rejected:" we see it now triumphant, in the state of "the head-stone of the corner."

At the time when brought out, to what purpose was it brought out? To the purpose of displaying the rhetoric and the latinity of the phoenix of the law. To the purpose of the cause, it was altogether useless: the object of the application was, to quash the proceedings of the Ecclesiastical Court, on the ground of excess of jurisdiction: to prove the excess, nothing more was necessary than a reference to the lawyer's gospel, the register of writs. What could have occasioned the time taken for *advisation*, is beyond conjecture.

But though, in the unlimited latitude ~~given~~ to it, the maxim was widely and no

untrue; yet, from that bad authority, and the good but unnoticed authority (the writs in the register), taken together, there seems reason enough to conclude, that at common law, on all trials in which juries bore a share, the practice of administering an oath to the defendant, and therefore putting questions to him (and particularly in criminal causes), had never been in use. For in both the writs, the stress of the censure is laid on the administration of the oath; and in the latter it is expressly stated as being contrary to the custom of the nation.

If, then, the application of it had been confined to that part of the law designated on some occasions by the name of the common law, viz. the practice of the common law courts, the truth of the maxim appears indubitable; at least so far as concerns the non-administration of an oath to the defendant, in cases deemed to belong to the class of criminal cases, and subjected to the cognisance of a jury.

But in the maxim, nothing is said about the oath: it goes further, and, in as far as any determinate signification can be put upon it, it puts an equally decided negative upon the practice of putting particular questions to the defendant, with or without the oath. But on this head we are left altogether to seek for evidence. Because no oath was administered to the defendant, it follows not by any means that no particular questions were put to the defendant. In capital cases, to the witnesses called by the defendant no oath was administered till more than a century after; yet wit-

nesses for the defendant, and those, too, speaking in answer to particular questions, could not but have been heard.

In those dark times, in which moral conduct was so much worse, and terror derived from supernatural sources so much stronger and more prevalent, than at present, the ceremony of an oath appears to have been a tremendous bugbear; so tremendous, that, by this consideration concurring with others, a doubt presents itself whether originally an oath used to be administered at all to witnesses in any causes, civil or criminal, on the plaintiff's any more than on the defendant's side.

In the treatise penned by Chief Justice Britton, under Edward I., and, upon the face of it, purporting to constitute a code of law sanctioned by that king's authority, much is said of perjury. But the crime there spoken of is, throughout, the crime of the judge, or other official person; nowhere the crime of the witness.

Subsequently to the statute of the fifth of Elizabeth (the first statute by which punishment was annexed to testimonial perjury), cases relative to perjury occur in plenty in the books; antecedently to that point of time I cannot find one.

Investigating a point of this sort is groping in thick darkness. Books of reports, confined in their subject-matter to transactions at trials before a jury, are but of yesterday: in no instance, in any of the report books containing the accounts of legal transactions of a date prior to the above, is any account of

trial to be found : add, nor (in relation to any of the points here in question) of any transaction carried on in the course of any such trial.

Of an account of the proceedings in any trial before a jury, of a date prior to that here in question, the only example extant is of the date of 1554 ; about nine years prior to the date of this statute. It is the trial of Sir Nicholas Throckmorton for treason, in the first year of Queen Mary : for treason supposed to be committed by participation in the insurrection for which Sir Thomas Wyatt had suffered death. It is reported from Hollinshed's Chronicle ; and the discourses (as reported) wearing the same dramatic form as on a modern trial, the words appear upon the face of them to have been taken down, as if in short hand, from the mouths of the interlocutors.

Besides a variety of interesting particulars having no immediate relation to the present subject, it affords very material information in relation to two points that have here been brought to view.

1. In the first place, not only is the defendant heard in his own defence, at his own instance, but questions upon questions are put to him without reserve, in the same manner as if to any extraneous witness : questions, having as plainly for their object the extracting answers of a nature to criminate him, and lead to his conviction, as any questions which a man, aiming professedly at that object, could devise.

Answer given directly and in detail : not a question objected to : no complaint of the illegality, or so much as the hardship of the practice.

2. In the next place (what bears directly upon the point here in question), it affords no slight reason for suspecting, that at this time (in capital cases at least) the practice of administering an oath to a witness for the prosecution, was either a novel proceeding, or a ceremony the performance of which was optional on the part of the judge.

A written confession made by Cuthbert Vaughan, a man already convicted of the same treasonable conspiracy as that of which the defendant Throckmorton stood indicted, (Vaughan still living and producible), had been read in the first instance; a proceeding alike repugnant to the manifest principles of reason and justice, and to the present practice. Then ensues the following dialogue.\*

" *Attorney-General.* Why, will you deny  
" this matter? You shall have Vaughan to  
" justify this here before you all, and *confirm*  
" it with a booke oth.

" *Throckmorton.* He that hath said *and*  
" lyed, will not, being in this, stick to *sweare*  
" and lye.

" *Then was Cuthbert Vaughan brought into*  
" *the open court.*

" *Sandal or Sandell*, [Clerk of the Crown].  
" How say you, Cuthbert Vaughan, is this  
" your own confession, and will you abide by  
" all that is here written?

" *Vaughan.* Let me see it and I will tell  
" you.

" Then his confession was shewed him.

" *Attorney.* Bycause you of the jury the

\* State Trials, i. 67.

“ better may credite him, I pray you, my lords, let Vaughan be sworne.

“ Then was Vaughan sworne on *a booke* to say nothing but the truth.”\*

Written confessions and hearsay evidence produced of the supposed testimony of other

\* I mention the above but as a suspicion, and no more. What is beyond dispute is, that the ceremony of putting the convict witness to his oath was considered as optional. But it might be that it was not considered as optional, any otherwise than as attached to the act of producing the man to be examined in the character of a witness; and that, supposing him produced and about to be examined in that character, the performance of the ceremony was indispensable.

Such is the construction that a reader of modern times, whose surmises and expectations are influenced by the invariable tenor of modern usage, would naturally be led to adopt in preference.

On the other hand, the passages which appear to lend more or less countenance to the opposite interpretation are not altogether without their weight.

“ You shall have Vaughan to justify this . . . and confirm it by a booke oth.” Here we see the proffered justification, *i. e.* *vivâ voce* testification, mentioned in the first place, and of the oath a distinct mention made, as if it were a security that might have been superadded or not to the security afforded by the confrontation and the examination; just as the act of producing the man for these purposes might itself have been performed or declined at pleasure.

So much for the *proffer* made of the ceremony: observe now the account given of the *performance* of it. “ Then was Vaughan sworne on *a booke* to say nothing but the truth.” Upon the face of this account, has not the ceremony somewhat of the air of a novel practice? not *the* book, but *a* book. By the article *the*, an implied reference would have been to usage, to usage as established; but whether invariably adhered to or not would still have been another question. But the article is not *the*, but *a*: as if the sort of book, not being fixed by usage, was scarcely known. In a modern trial, now that the previous administration of an oath is a practice so completely in course, is any such language ever made use of for the expression of the fact?

persons, producible and yet not produced. Exclusion put, and without the shadow of a pretence, upon the testimony of a person then present, and whose testimony had been called for by the defendant. Acquitting him, the jury were prosecuted for it in the Chamber, and punished by ruinous fines.

Execrably flagitious in these and other respects, the proceedings were not the less legal. If the station of judge does not give legality to the proceedings of him who acts in it, how can any proceedings be legal? Here we have the chief justice of the King's Bench, another judge of the same court, a judge of the Common Pleas, a master of the rolls, and a master of the Court of Wards and Liveries, all learned, in the law sense; besides a couple of peers, and as many privy counsellors, the lord mayor of London, and a knight; all sitting at Guildhall as commissioners.

Illegal? Oh yes, if irreconcilable to an antecedent series of uninterrupted practice: but in this instance there is not a single case to which it can be opposed. It is the only one we have.\*

\* Sir Edward Coke, eminent already, though not yet in office, was the counsel by whom, in one at least (*viz.* the latter) of the occasions above mentioned, the impressive maxim, *nemo tenetur seipsum prodere*, was displayed. He was already in existence, though not more than five years old, when this trial (we have seen how remarkable a one) took place.

Saturated as he was, and super-saturated, with law learning, was it natural that a case of such importance, a case in point, in the history of his own time, should have been a secret to him? But Coke, as inaccurate as he was garrulous, was ready at any time to entertain the public with the first runnings of his thoughts.

No practice could come in worse company, than the practice of putting adverse questions to a party, to a defendant, and in a criminal, a capital case, did in that instance. If, however, the practice be itself subservient to the ends of justice, the having been resorted to in company with others of an opposite tendency, is a circumstance which, how natural a cause soever for reprobation, can never be a just one.

Where no oath has been taken, false and mendacious testimony there may be in any quantity, but perjury there cannot be. The causes have been seen, by which a suspicion at least is induced, that the practice of administering oaths to witnesses, and consequently the possibility of committing testimonial perjury, was, at the time of passing the earliest of the statutes relative to this offence, of no very ancient date. If so, it could not be true, that "perjury" in a witness was "punishable" (to use the words of Lord Coke) "by the common law."\*

True it is, that in that same passage he gives us the history of a case, (a Star Chamber case) tenth of James I., A. D. 1612, in which it was resolved that perjury in a witness was punishable at common law. But the very fact, that a resolution to that effect was at that time necessary to be passed, serves, I must confess, to strengthen the suspicion suggested by the former considerations, that it was not true. If, antecedently to the statute, the punishment of perjury had (elsewhere at least than in the

\* 3 Inst. 164.

Star Chamber) ever been exemplified, the occasions would have been too frequent to leave the matter involved in any such doubt as it could require an express resolution to remove.

To what purpose, then, be at the pains of resolving that perjury was punishable at common law, fifty years after the passing of the statute that had been made to punish it? The answer is,—because, (as we learn from Lord Coke in the same place) upon taking measure of the statute about fourteen years before, it had been found too narrow.\*

Among the various devices in use with English judges for stealing legislative power, this may be mentioned as one: when a statute, which as far as it goes is to their liking, is found not large enough, or has been unmade by the authority that made it, they fill up the deficiency with an imaginary mass of common law. Common law, a creation of their own imagination, forms thus a sort of *plenum*, upon which, as often as a vacuity is to be filled up, they draw at pleasure.

SECT. V.—*Of self-onerative, self-disgracing, and self-discrediting evidence.*

1. *Self-onerative* evidence.

The distinction between *self-criminative* testimony and *self-onerative* is here employed for the purpose of its corresponding to a distinction to which, in the technical system of procedure, so many important consequences

\* Coke's Rep. v. 99. Flower's case.

have been attached: I mean the distinction between *criminal* cases and *civil* cases.

It is on this occasion that self-criminative evidence calls for a distinction of no small practical importance: 1. testimony self-criminative to the effect of ultra-pecuniary punishment; and 2. testimony self-criminative to the effect of punishment not more than equivalent to pecuniary:—a distinction which seems sufficiently explained by the terms in which it is here expressed.

Unless it be where, and in so far as, the testimony comes under the appellation of *self-disgracing* or *self-discrediting*; self-criminative evidence, when in its penal effects limited to punishment not ultra-pecuniary, will (it is evident) to that or any other purpose, stand on no other footing than testimony simply *self-onerative*. To the extent, therefore, of that part of the scale, the two species, *self-criminative* and *self-onerative*, coincide.

If, on the score of any injury, or other transgression, the delinquent is adjudged to pay in each of two cases a determinate sum, (say 10*l.*); his unwillingness to subject himself to that obligation will not be less, in the case where the money, when taken out of his pocket, is put into the pocket of his personal adversary, the party injured, than in the case where it is put into the pocket of another party, with whom he has no quarrel; as, for example, the sovereign, whether for his own benefit, or for the benefit of the community at large. On the contrary, if there be a difference, it is in the case where the amount of the quantity of the matter of wealth lost to himself is so dis-

posed of as to add to the enjoyment of his adversary,—it is in that case, that his unwillingness to deliver the testimony which is to be productive of this effect, will naturally rise to the highest pitch.

If,—in the case where the effect of the conviction, if brought upon himself by his testimony, would be to subject him to the payment of the 10*l.* to the use of a person unobnoxious to him,—his testimony, even on the score of the unwillingness and vexation supposed to be attached to the delivery of it, were to stand excluded; while, in the case where the effect of it would be to subject him to the payment of an equal sum to the use of a person more or less odious to him, his testimony (notwithstanding the at least equal unwillingness and vexation that might well be supposed to be attached to the delivery of it) were *not* to stand excluded; flagrant surely would be the inconsistency with which, in the judgment of every mind not prepossessed and perverted by technical ideas, an arrangement to such an effect would appear chargeable. Give now to the first of the two cases the appellation of a *criminal* case, to the other, the appellation of a *civil* case: will the real inconsistency thus seen to exist between the two arrangements of law, be at all diminished by these two words?

Among the different modifications of self-prejudicing evidence above distinguished, the case in which the pretence for the exclusionary rule is most plausible, is evidently the case where the testimony is self-criminative, to the effect of *ultra-pecuniary* punishment:—where the punishment, to which by the testimony in

question a man exposes himself, rises to a degree of afflictiveness above the utmost to which pecuniary punishment, in the highest degree in which a man can be made susceptible of it, is regarded as equivalent.

But even in this case it has been shewn, that, by the vexation (be it what it may) attached to the production of the effect by means of evidence of this particular description, in contradistinction to other evidence at large (*i. e.* to extraneous evidence), no sufficient or proper ground for the exclusion of the evidence can ever in any instance be constituted. *A fortiori* then, neither can it, in the case where, in respect of the prejudicial effect of it to the deponent, the evidence is simply self-operative, or no more than equivalent to self-operative.

2. *Self-disgracing evidence.*

On the subject of self-disgracing evidence, a distinction must again be noted. If, in the case where the evidence is self-criminative, exposing the deponent to punishment (*i. e.* to suffering, on account of some transgression of the law of the state, or of the received rules of morality), the effect of the punishment (whether in respect of the transgression to which it is attached, or in itself) is to subject a man to disgrace;—a question may be started, whether the effect of such disgrace be, or be not, to raise the punishment above the level of the most onerous pecuniary obligation. But, for the practical purpose of determining whether the evidence in question ought or ought not on this account to be excluded, the inquiry would be purely speculative and useless; it being already understood, that by no degree of magnitude on

the part of the punishment can a sufficient ground be formed for the exclusion of self-criminative evidence, howsoever modified.

A use that has been made of the appellative *self-disgracing* is this: where the offence to which the punishment is attached is of a disgraceful nature, by whatever testimony a man exposes himself to suffer as for that offence, he exposes himself of course to the disgrace attached to it.\*

Thus far, then, self-disgracing testimony coincides with, and is included under, self-criminative. But suppose the punishment already inflicted. Here we see a case in which, in the course of a man's testimony, the fact of his having suffered this punishment, and thence of his having committed this transgression, may be brought to view. Here, then, his testimony, though it cannot (to the effect of its being considered as exposing him to suffer punishment of a disgraceful or any other nature) be ranked with propriety under the head of *self-criminative* testimony, may, with not the less propriety, be termed *self-disgracing*. To distinguish it from the case where, by the same means to which a man's testimony exposes him to disgrace, it exposes him to punishment in other shapes,—it may be termed, *simply* self-disgracing.

If, by testimony which, besides being self-disgracing, is self-criminative, no proper ground

\* So, likewise, even where, although in itself the offence imports no disgrace, yet, in consequence of the power of association over the imaginations and affections of mankind, the punishment attached to the offence is of itself productive of that effect.

for exclusion can be constituted; much less can any such ground be constituted by testimony which is self-disgracing simply; self-disgracing without being self-criminative. Not so, however, says English law.

A man is produced as a witness on either side: on a former occasion he had been convicted of an offence, of which, if ascertained, the effect would be to diminish his credibility, to weaken the force of the persuasion of which his testimony might otherwise be productive. Shall the question be put to him, whether it be true that, on the occasion mentioned, the conviction in question took place? No; says a rule of English law. No? Why not? Because this is making a man disgrace himself, making a man expose himself to shame. And why not make him expose himself to shame, if he has done what by the supposition he has done; that to which the opinion of mankind, following in this respect the finger of the law, has annexed disgrace,—properly and deservedly annexed it? Oh! (says the prejudice) because a self-disgracing, or call it a self-degrading answer, is a sort of self-accusing, self-convicting answer: if it be not exactly the same thing, it is analogous to it, it is like it, which is enough for us.

Still the same delusion, still the same shortsightedness, still the same inconsistency and self-contradiction. The witness has been convicted, say of perjury: if his disgrace be offered to be proved by other evidence, by such evidence as the law chooses to receive (say, by the record of his conviction),—if this be the case, it is all well: the evidence cannot be dis-

allowed. It is not to the act of disgracing him that the prejudice opposes itself; it is only to the channel through which the disgrace is conveyed. Disgraced he may be: disgrace him you may, and welcome: only he must not be disgraced out of his own mouth.

In this case (as in the case of self-convicting evidence), if so it happens that he has disgraced himself in this same way at some other time,—if any other person affirms that in his hearing he has acknowledged the having undergone any such conviction, or the penal consequences of it,—evidence of this loose extrajudicial confession may be produced and exhibited to his face. It is not that the fact is not to be proved; but it is not to be proved any otherwise than in a bad way: it is not to be proved by immediate evidence, it is only to be proved by unoriginal, by hearsay evidence: it is not to be proved by testimony the whole of which is covered by the sanction of an oath; it is only to be proved by evidence of which the half only is covered by the sanction of an oath.

To what end seek to exempt a man from this accidental shame? It is a suffering that arises out of his delinquency, and in the nature of the case will bear a proportion (as exact a one as can usually be obtained) to the degree of his delinquency: by the example it affords, it will render itself subservient to the main end and purpose of punishment, the deterring others. In trials in general, publicity is a circumstance not deprecated, but aimed at, and generally approved. Beneficial as it is recognized to be on all other occasions, what should render it otherwise than beneficial on this? The evil,

then, is no other than a part, though an accidental part, of the evil of punishment; that evil which, by the supposition necessarily involved in the institution of the penal law, is outweighed by a greater good. The publicity of punishment is one of the constant and applauded aims of the law upon all occasions: it is only by that part of it which is public and known, that the punishment does any good: so much of it as is unknown, is so much pure evil, so much misery in waste. The publicity of its punishments is one of the constant aims of the law on all occasions: on the particular occasion in question it is attended with a particular use, over and above every use with which in general it is attended: to what end, with what sort of consistency, seek on this occasion to cover that shame, which on all other occasions it is the object of the law to uncover? To what end seek to cover it now,—now when the uncovering of it is demanded for a particular useful purpose?

The inconvenience of the rejection is this: either you cannot prove the fact at all, or if you do prove it, you prove it by evidence the production of which is attended with an additional and useless expense.

The witness in question is, by the supposition, on the spot: get the evidence from him, you get it without any additional expense or vexation in any other shape. If it is not from him that you get it, and yet you get it notwithstanding, the evidence you get of it is a *record*: a great mass of parchment, which, or a copy of it, is to be lugged into court, at I know not what expense. To avoid loading this guilty

person with an ideal suffering, you impose a real suffering upon some innocent one. Better for the party, perhaps, to let the suspected evidence go for unsuspected, than to purchase the faculty of throwing the suspicion on it at so heavy an expense.

This is not all. Perhaps the record is not producible: there is no time for it. The stain upon the character of the witness does not come to the knowledge of the party till a few days before the day appointed for the trial: the trial cannot be put off for this purpose, or not without a disproportionate expense: and the interval between the day of the discovery, and the day appointed for the trial, affords not time sufficient for the production of the necessary parchment.

Two errors are here combined: two opposite excesses. When the fact of the conviction is suffered to appear, the witness is rejected absolutely: when the truth is thus prevented from coming to light, the tainted testimony is palmed upon the jury for sound. What says reason all this while? That in this case, as in all others, the testimony should be suffered to make its way to the ears of those to whom it belongs to judge, but not without the cause of suspicion stamped upon it: that they should be free to hear it, and free when they have heard it, to bestow upon it such credence as shall appear to them to be due to it.

But cases are not without example, in which, although no punishment at all be attached to the act, or none the application of which could with propriety be trusted to a promiscuous hand, disgrace is nevertheless attached to it.

Take for example fornication, especially on the part of a female, never married, and of character otherwise unspotted : take, again, adultery, especially on the part of the wife, whose infidelity, but for the testimony in question, might have remained unsuspected, and the peace of the husband undisturbed.

In a case of this sort, no good being attached to the disclosure, but so much pure evil ; the vexation (abstraction made of the demand produced for the testimony, by the cause for the purpose of which it is proposed to be called for) would be not barely preponderant, but pure, without any thing in the opposite scale to weigh against it.

Shall it, then, be exacted, or excluded ? The answer depends upon the principle already laid down in a former place. Exacted, if the mischief from misdecision for want of the evidence, would be preponderant over the mischief consisting of the vexation produced by the disclosure. Excluded, if the preponderance be on the other side. Exact it, if (for example) but for the benefit of this evidence, the defendant, (the prosecution being capital, and he innocent) will, over and above the disgrace attendant on conviction, be unjustly put to death. Exclude it, if the question be no more than whether the defendant be liable to pay a penalty, or an alleged debt, to the amount of a few shillings.

In the two opposite cases here exemplified, the propriety of admission in the one case, of exclusion in the other, will scarcely raise a doubt. Between these two extremes to draw a line of demarcation, will be (as already observed) a task, to a certain degree for the legis-

lator, and, where his means of discrimination terminate, for the judge.

3. *Self-discrediting* evidence.

The range of *self-discrediting* testimony is yet more narrow. The term may serve to signify self-disgracing testimony of any kind, so far as it is considered as productive of this particular effect.

Far from constituting of itself a proper ground of exclusion on the score of vexation, it is not in the nature of it to contribute any thing to the formation of any such ground on that score. Vexation, all the vexation which it is in the nature of such testimony to be productive of in the breast of the deponent, consists in the disgrace. As to his testimony's being believed or not believed, (it being by himself that whatever evil consequences may result from it are to be borne); if it were not, in any part of it, to be believed, — if, in respect of its effect, it were in so complete a degree self-discrediting, — his vexation would be but so much the less. But such (as every one sees, and as we have seen already) is not the effect of acknowledged *untrustworthiness* on the part of the deponent, where it is on his own shoulders that the burthen of the decision falls. On the contrary, the more *untrustworthy* he appears as to other points, the surer every body is, that whatever part of his evidence is understood by him to operate to his own prejudice, is true.

SECT. VI. — *Case of evidence self-disserving*  
*aliâ in causâ, considered.*

It may happen that the cause, by means of

which the deponent exposes himself to the mischief attached to the self-prejudicing evidence, is not the cause in hand, but another cause, viz. a cause already in prospect, or a cause liable to be produced by the disclosure made by the evidence.

In respect of the quantum of vexation, the variation here in question will make no difference.

But, compared with the opposite case, (with the case in which the mischief consists in an unfavourable termination of the suit actually in hand), the reasons in favour of admission, the reasons against the exclusionary rule, operate in this case with redoubled force.

Against the evil of the self-regarding vexation produced by the self-disserving testimony of a *party*, there is no other good to be set than the advantage attendant on a right decision, instead of misdecision or failure of justice, in that *one* cause. But in the case where the proposed deponent is an *extraneous witness*,—in addition to that same lot of advantage, (in so far as the testimony is in this respect efficacious) there comes the advantage attendant on a right decision, instead of misdecision or failure of justice, in *another* cause: to wit, the additional cause to which it is the tendency of such disclosure to give birth.

Prosecution for robbery: John Stiles examined in relation to it, in the character of an extraneous witness. A question is put, the effect of which, were he to answer it, might be to subject him to conviction in respect of another robbery, attended with murder, in which he bore a share. On the ground of public utility

and common sense, is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone? Refusing to compass the execution of justice by this means, by what fairer or better means can you ever hope to compass it?

The punishment he will incur, if any, will be a distinct punishment, for a distinct offence; an offence which, at the institution of the suit, was perhaps never thought of.

Be it so: and should this happen, where will be the mischief? wherein consists the grievance? That a crime, which, but for the accident, might perhaps have remained unpunished, comes, by means of this accident, to be punished. Of the penal law in question, nothing being known but that it is a penal law, is it thereby known to be a bad one? and to such a degree a bad one, that the execution of it is a grievance? Is the state of the law then such, that a law taken at random is more likely to be a bad one than a good one? a nuisance than a security? Or is a law the less likely to be good, the more likely to be bad, because it is by this accident, rather than any other, that the transgression of it happens to be brought to light?

This increase of reason, this reduplication of advantage, extends itself (it is evident) with proportionable force from the top to the bottom of the scale of good on one hand, of evil on the other, attached to self-prejudicing, to self-dis-serving, evidence: to all degrees of self-criminative, to all degrees of self-onerative: to all suits called criminal, to all suits called civil.

But what shall we say, if, by a summons to

appear as a witness in a cause (penal or non-penal) between other persons, an individual is purposely entrapped; and, being (in obedience to that summons) actually in court, is interrogated concerning a distinct offence supposed to have been committed by himself, and, in consequence of his answers, stopped and consigned to durance.—What? Why,—that, so a delinquent be but brought into the hands of justice, just as well may it be by this means as by any other. Truth is not violated; fiction is not employed: no false tale is told; no falsehood here defiles the lips of justice.

Nor, though possible, is the case likely to be frequent. The question must be relevant, pertinent to the cause actually in hand, or an answer will not be (for it ought not to be) allowed to be given.

The suit not as yet in hand, may possibly have been the principal object in view in the summons.—But what if it be? If, instead of being, in this way, stopped when appearing to give evidence in another suit, the witness had been arrested in consequence of a direct charge made upon him on the ground of such his offence,—in what respect would his guilt have been increased, or his suffering, in respect of it, diminished?

Even now, it occasionally happens that a person summoned to appear as a witness in a cause to which he is not a party, appears accordingly, and, being deemed guilty of perjury, is committed.

But even under the supposition that the admission of *indirectly* elicited self-convicting evidence were, as such, improper; still, if the

admission of *directly* elicited self-convicting evidence be proper, no distinct mischief can be chargeable to the account of self-convicting evidence when indirectly elicited. Why? Because, admitting the propriety and consequent existence of the practice of admitting self-convicting evidence, a regulation excluding the faculty of extracting self-convicting evidence incidentally, would not operate as a bar to the supposed mischief: since the evidence in question, if not extracted out of the cause in which it happens incidentally to present itself, might always be obtained; viz. by a distinct suit instituted on purpose: and with the same mischief and suffering to the party prejudiced, viz. the delinquent; though not with the same convenience in respect of despatch, and in respect of the throwing those fuller and ulterior lights that might thus be thrown upon the offence first pursued, by other offences that happen to be connected with it. In a word, supposing direct evidence of this kind to be admitted,—then, if you exclude incidental, whatever effects may be apprehended from it, of a kind which are (with or without reason) regarded as inconvenient, will still be produced, but with additional inconvenience.

An effect (for example) which certainly might, by design and contrivance be brought into existence by incidental self-convicting evidence, is, that of instituting a sort of feigned suit, penal or non-penal, for the purpose of bringing to light, not the facts belonging properly and directly to the avowed cause of action, but others, of a complexion differing to any degree of remoteness. Suppose, for example, a project

formed for bringing down disgrace and punishment on the head of an individual, by means of questions to be put to him, in the character either of a defendant or a witness, in a cause to be instituted on purpose; drawing thus out of his mouth the confession of some crime, or disgraceful act, for which he has not been prosecuted. May not this be done? Yes: but not with any advantage to the party whose invention is supposed to be thus employed, nor with any disadvantage to the party against whom it is supposed to be employed. Why? Because in this there is nothing more than what might be done in a direct and ordinary way, by a suit instituted on purpose.

In every point of view, then, in which it can be considered, the practice in question appears to stand clear of objection. In the first place, because the result supposed to be produced, cannot, with any propriety, or in consistency, be reckoned in the number of undesirable results: in the next place, because, though it were, no ulterior facility is afforded for the production of this supposed undesirable result: no new or ulterior facility is afforded, beyond what would exist without it.

Under the systems of procedure derived from the Roman law, and in particular under that formerly pursued in France, self-convicting evidence being allowed to be extracted in the direct way, so is it in the incidental and occasional way above described. The result is in the highest degree favourable to the interests of justice. At a very early period of my studies, accident having conducted me to the collection of remarkable trials known by the name of the

*Causes Célèbres*, comparing what I there observed with such observations as it had fallen in my way to make, in relation to trials (and especially in criminal causes) conducted in the English mode, one very striking point of diversity caught my eye. In the English mode, when any plan of deep and extensive artifice and villainy presented itself, it was only into here and there a corner of it that the light of discovery appeared to have been thrown: a multitude of circumstances remained still involved in darkness: a multitude of particulars still remained, in respect of which, the mind of the inquirer remained unsatisfied: he who should propose to himself to draw up a complete history of the criminal transaction, would find materials continually wanting; would, in a word, find the task impracticable. Why? Because, out of a multitude of delinquencies committed, the inquiry was, by the narrowness of the path chalked out for the course of procedure, confined to one: because, by this or that arbitrary and irrational rule, a seal was put upon the lips of those who knew most about the matter.

In the French mode, on the other hand, every transaction appeared to be sifted to the bottom; no doubt remained: all the actors, all the sufferers, were brought upon the stage; proximate causes, remote causes, concomitant circumstances and consequences, all stood before the reader at a view.

In the same proportion in which the faculty and practice of reaping the collateral advantage now and then presented by the self-dis-serving testimony of an extraneous witness, is

beneficial to the interests of society, it is prejudicial to the opposite and adverse interest; the interest of the professional lawyer, under every system; the interest of the official as well as of the professional lawyer, under the fee-gathering system.

It defrauds him, (that is, if admitted, which he has taken care it shall not be, it would defraud him) and in a double way, of his due. In the suit already in hand, it defrauds him of the several advantages already enumerated under the head of the *uses* of the exclusionary rule to the man of law. By means of the effect with which it may be, and (when the testimony thus obtained is sufficient to warrant the decision it points to) ought to be, attended; it defrauds him of the whole of the profit that might have been extracted from the additional suit, had it commenced and been continued in the regular and ordinary course: it produces to the community at large the benefit of two suits, with the delay, vexation, and expense, and consequently with the lawyer's profit, of no more than one.

This being the case, it may without difficulty be imagined how sincere an abhorrence the idea of a practice thus informal and irregular excites in their inflexible and learned breasts: with what heroic firmness they adhere, on this doubly important ground, to the exclusionary rule: with how tender a sympathy they contemplate, as if it were their own, the peril of the malefactor, or other evil-doer,—in whatever degree, and on whichever side of the cause, their customer, their partner, their best friend.

## CHAPTER IV.

## INCONSISTENCIES OF ENGLISH LAW IN REGARD TO SELF-DISSERVING EVIDENCE.

THIS rule, this exclusionary rule, which grounds itself on the evil of vexation, would not be a rule of jurisprudential law (more particularly of English jurisprudential law), if it had not its exceptions: and these exceptions (no intimation being given of them in the rule) forming so many contradictions; and the reasons of them (not being good but on the supposition that there are no reasons, or none but bad ones, for the rule) forming so many inconsistencies.

In a former place there was occasion to mention, in the character of so many uses to justice attending the admission of self-prejudicing testimony, (that is, of questions leading to the extraction of it), that thereby the receipt of two other species of evidence from the same source,—evidences equal at least in vexation, inferior in instructiveness, safety, and trustworthiness,—would in general be saved. These were, 1. papers (such as letters or memorandums) containing a discourse supposed to be that of the party; and 2. the supposed extrajudicial conversation supposed to be held by

the party, on any occasion not being a judicial one, and reported by another person in the character of a judicial witness.

Useful, in case of necessity, for the purpose of strengthening or weakening the opinion of the trustworthiness of the immediate evidence from the same source,—useful, though less safe, in the character of succedanea to it when it is not to be had,—who does not see how bad a substitute these unsanctioned and uncross-examinable evidences make, for the mass of immediate testimony from the same source? when it is to be had, and under the same securities for its correctness and completeness (*viz.* oath or what is equivalent, and counter-interrogation) as in the case of an extraneous witness.

These secondary and inferior species of evidence are accordingly admitted; but upon what terms? Upon the terms of their not receiving the confirmation, infirmation, explanation, or completion, that could have been applied to them by the immediate evidence from the same original source. Upon condition of their being freed from that check; of the judge's refusing to himself the benefit of that security against deception and misdecision; and no otherwise.

1. First contradiction to the exclusionary rule:—admission of the supposed casually and extrajudicially written discourse of the person excluded; to whom, for fear of vexing him, (he standing or not standing there), no questions are permitted to be put.

2. Second contradiction to the exclusionary rule:—admission of hearsay evidence, purporting to contain the casually and extrajudicially spoken discourse of the person to whom, for

fear of vexing him (he standing or not standing there), no questions are permitted to be put.

Of the vexation, for the avoidance of which such sacrifices have been made,—sacrifices not *to*, but *of* the interests of truth and justice,—an estimate may now be made. It is the difference between that which a man feels when the testimony, in consequence of which he sees himself exposed to suffer whatever it be, issues on the occasion in hand immediately out of *his own* lips or his own pen,—and that which he feels, when,—testimony to the same effect, exposing him to the same suffering, neither more nor less, having happened on some preceding occasion to escape from his own lips or his own pen,—he hears or sees it brought out against him on the occasion in hand, from the lips or the pen of some *other* person. The difference between what he feels at hearing brought out against him information which dropped from him at a time when he was off his guard, and knew not the use that would be made of it,—and that which he feels at the yielding the same information at a time when he is completely upon his guard. Now then, what is the real value of the mischief, in contemplation of which an amendment has been made in the maxim, *fiat justitia, ruat cælum*, *justitia* being erased, and *injustitia* substituted?

But it is a weight added to a man's affliction (it may be said) to have the proof that is to subject him to punishment drawn out of his own mouth. A weight?—no, not of a feather. What is this burthen, compared with the burthen imposed without remorse upon individuals completely innocent,—upon the individuals con-

vened as witnesses? The suffering—the real suffering—is that which is inflicted by the punishment itself: a suffering, the infliction of which is by the supposition (speaking with reference to the aggregate interests of the community) a desirable event. In that, and that alone, consists the real affliction. As to the supposed addition,—a mere metaphorical quantity,—except in the mind of the rhetorician it has no existence.

You are sure of being convicted: by what sort of evidence would you choose rather to be convicted? By the evidence of other people without any of your own, or by evidence of other people's and your own together?—Were a question of this sort put to a malefactor, would it not be matter of perplexity to him to choose? Would not a pot of beer or a glass of gin, on whichever side placed, be sufficient to turn the scale?

But allowing, for the sake of argument, that there is a difference between the pain in the one case and the pain in the other: for my own part, I can see none: but if there be, can it be assumed as a competent and sufficiently broad and solid ground for the establishment of a rule of law? Is there any thing here capable of being set against the mischiefs of impunity? the mischiefs of the offence (be it what it may) which the law in question,—the law which the rule of exclusion in question seeks to debilitate,—is employed to combat?

Justice out of the question (which certainly has nothing to do in it), refer the matter to mercy, whatever be meant by mercy; and ask, whether a malefactor be the less deserving of

mercy, because it so happens, that, without putting any questions to himself, evidence sufficient to conviction happens to come in from other sources?

In England, society exists; therefore English law *must* have given admission either to the makeshift or to the regular evidence from that same source. It excludes the regular; it admits the makeshift. Observe, then, the result of this prodigious scrupulosity, of this sentimental tenderness:—a preference, and that an exclusive one, given to inferior evidence.

*Lawyer.* Inferior? ay, in your estimation.

*Non-Lawyer.* Yes: but I speak not of my own estimation only, nor of the estimation of men in general only, but of your own. Suppose it the case of an extraneous witness: a person whose testimony it is proposed to call in, he having no share or interest in the cause. Do you in that case accept of a letter or memorandum of his, or a supposed extrajudicial discourse of his, in lieu of the judicially delivered testimony of his own hand, or the immediate evidence of his own lips? Do you in this instance exclude the regular, open the door to the makeshift evidence, from the same source? Not you, indeed: far from excluding the regular evidence, you do not admit the makeshift: far from giving an exclusive admission to the makeshift, you do not (unless incidentally, for information or confirmation) give it any admission at all.

3. In the short and disastrous reign of Philip and Mary, came out the statute\* so often men-

\* 2 and 3 Philip and Mary, c. 10.

tioned, in virtue of which, in cases treated as criminal, and where the punishment rises to that of felony, justices of the peace, acting singly, are empowered to resort to the mouth of the defendant (the supposed transgressor) for information on the subject of the offence.

Not a syllable can he utter that may not have, that was not designed at least to have, in case of his having been guilty, the effect of self-criminative evidence. Not a minute after any such question put to him can he remain silent, but his silence (at least if the use were made of it that might, and ought, and was intended to be made of it) would, in like manner, have the effect of self-criminating evidence.

Contradictory, however, as this statute is, when compared with the jurisprudential rule; the charge of inconsistency (it must be confessed) extends not to this case. The rule was the work of the man of law, seeking his own ends. The exception,—a sprig of common sense, imported from the continent of Europe, and planted in a bed of nonsense and hypocrisy, by which it has been nearly choked,—was the work of the sovereign, seeking the welfare of his people through the ends of justice. Happy the nation, had no worse importation taken place under the auspices of Spanish influence!

Third contradiction to the exclusionary rule:—preparatory examination of suspected felons, under the statute of Philip and Mary.

Thus far we have seen the contradictions given to the rule, when the punishment, to which the man exposes himself by his self-criminative evidence, is ultra-pecuniary: rising, in its lowest degree, above the highest level to which pecu-

niary punishment is capable of extending itself.

Observe, now, the contradictions which it has received in the case where the punishment is not ultra-pecuniary,—does not, in its highest degree, rise, in point of afflictiveness, above the level of pecuniary punishment.

But in the case where, in how heavy a degree soever onerous, the heaviest obligation to which the party stands exposed does not wear the name of punishment,—*self-operative*, self-operative simply, is the name that has been given to the evidence. The cases embraced by self-criminative evidence exposing the party to punishment not beyond pecuniary, and the cases embraced by evidence simply self-operative, are therefore, to this purpose at least, the same cases: the rules and practices, therefore, that operate in contradiction to the rule excluding self-operative evidence, are so many contradictions to the rule by which self-criminative evidence, to the effect of punishment not ultra-pecuniary, stands excluded.

4. A motion for an information (a criminal information) is a suit instituted to know whether a suit shall be instituted: a suit carried on upon the worst evidence that can be found, to know whether a suit for the same cause shall be carried on upon good, or less bad, evidence: a suit carried on upon premeditated, preconcerted, uncrossexaminable evidence, to know whether the same suit shall be carried on upon unpremeditated, unconcertable, cross-examined evidence.

When the prosecution is in this mode, (and there are few crimes short of capital, the prose-

cution for which may not be carried on in this mode), the principal piece is never suffered to be performed before a single judge, for the benefit of justice, till in this style a prelude to it has been rehearsed at his majesty's theatre in Westminster Hall, for the benefit of the lawyers.

*Lawyer.* Nay, but what is this to the purpose? Here no questions are asked: the defendant says what he pleases.

*Non-Lawyer.* True, sir, no questions are put in the form of questions: but allegations have been made; allegations, which, to the purpose here in hand, howsoever imperfectly calculated for the complete and correct discovery of truth, have the effect of questions. By the affidavits of those willing witnesses whom he has procured to join with him, the prosecutor has made his charge. The defendant delivers in his affidavit or not, as he thinks fit: but (the rule having been made upon him to shew cause) so sure as he omits to deliver in an affidavit, so surely, in this preliminary suit, is he cast. If he pleases, he may be silent, taking the consequences; and so he may be, though the exclusionary rule were abolished.

Of a complete abolition of the exclusionary rule, what (at least in the case of a party) would be the effect? Not compulsion, the exaction of an answer; but simple permission: permission to put questions: he to whom the question is put, answering or not answering, at pleasure.

Are you an equity draughtsman? You are not to learn, then, that in equity, an allegation, a charge, is every thing: a question, nothing.

n Question—charge? Question  
i or no interroga-  
ment, and compelled  
to say the obligation  
is equally coercive. Is an  
charge for its sup-  
had been said.

say the obligation  
equally coercive in this  
the assizes, the Old

es, that I can. The ob-  
ue. No: on the contrary, if  
has every encouragement that  
to engage him to speak  
oath—to engage him to  
time for premeditation;  
counsel to instruct and assist  
of evasion; 3. time for con-  
with co-affidavit men and co-  
he can get any; 4. no questions  
he assurance that if he swears  
his own testimony, though with  
of the prosecutor in the teeth of  
conclusive, and save him from all  
Truth, therefore, if guilty, he  
encouragement not to speak: but  
bound to say, or condemnation  
charge be strong enough, to  
obligation he stands bound con-  
to criminate himself, or to

condemnation! why talk of con-  
is not the trial, the inquiry by  
he may be either convicted  
to come?

*Non-Lawyer.* Yes, in the case of an information. But be pleased to go on to the next article.

5. There are a class of suits which, though not much less frequent than the denominated ones, have never yet received a name; let us call them *Motion Causes*. The demand,—instead of being stated by the pen of one sort of lawyer, in the form of a written instrument, an indictment, an information, a declaration lodged in an office,—is stated by the tongue of another sort of lawyer, in a harangue made in open court, called a motion. Instead of being tried on *vivâ voce* evidence, the question in this case is tried solely upon *affidavit* evidence.

On an information, after having had the advantage of being condemned once on bad evidence, a man may have the privilege of being condemned again upon better evidence. But in a motion cause, condemned once, he is condemned for good and all: if condemned at all, he is condemned upon the bad evidence.

Of these motion causes, some are considered as criminal causes, some as civil causes. Criminal causes; for example, motions for attachment; motions that the defendant may answer the matters of the affidavit. Civil causes; for example, motion to set aside proceedings for irregularity; motion to set aside an award that has been made a rule of court.

Under the head of motion causes may be ranked (to this purpose at least) petition causes: the causes by which masses of property are disposed of to any amount, in the case where the possessor has been aggregated to that class of insolvent debtors who

have been styled bankrupts. In these cases, whatever motion the ears of the judge are entertained with, is preceded by a written instrument called a petition, which gives him little trouble. In these cases, the evidence by which the cause is decided being purely affidavit evidence, they present, in this respect, no difference to distinguish them from the aggregate mass of motion causes.

6. Another occasion on which self-disserving evidence, and that self-criminating, is not only allowed to be called for, but compelled, is that on which the evidence is extracted from a defendant by the subordinate judge called the master, by means of ready written questions, called on this occasion *interrogatories*.

So seldom does the occasion for this operation present itself, that it would not have been worth mentioning, except that it may be seen that it has not been overlooked.

In the case of an information, the second inquiry before a jury comes on of course, if,—on motion for leave to file the information, and the first inquiry, affidavit inquiry, (if an inquiry it can be called, on which no questions are asked) in consequence,—the rule to shew cause is followed by an absolute rule, leave granted, and information filed. If the second inquiry comes of course, the cause cannot, to the disadvantage of the defendant's side, be determined without it.

In the case of an attachment, unless it be in one out of several hundred (not to say thousand) causes, the first inquiry is the only one; the fate of the defendant is determined by it.

But in a case that has been known now and

then to happen, after the fate of the defendant has been determined on the ground of the affidavit evidence, with or without extraneous witnesses on both sides, the defendant alone is subjected to a second inquiry, performed by the ready written questions as above mentioned.

On an occasion of this sort, no more reserve is used than would have been used had the rule *nemo tenetur seipsum prodere* never been heard of. If time is given him to study his answer, and a copy of the interrogatories given him for that purpose, he is thereby examined in the way a defendant is examined in the civil suits called equity suits. If answers are required of him on the spot, he is thereby examined as extraneous witnesses are examined, on the occasion of these same equity suits.

7. Must it be mentioned? Yes, it must; how frequent soever may be the need of mentioning it on other occasions:—or the catalogue of the inconsistent infringements of this rule will not yet be complete. In cases of indictment and information, if the defendant has been convicted by his own default, or by a jury upon the good evidence, the appetite of the partnership is not yet satisfied: the chain of inquiries is not yet regarded as complete, without a third inquiry, in which the cause is tried over again upon the bad, the affidavit, evidence. I speak of the supplemental inquiry, carried on antecedently to, or upon, his being brought up for judgment.

By the same evidence by which the same cause is thus tried over again for the third time, another cause (it frequently happens) is

tried for the first and last time,—another cause, of which no jury has had cognizance. I speak of the charges so frequently brought against the same defendant, for misbehaviour, alleged to have taken place at a time subsequent to that of his conviction by the jury for the former cause.

Such is the respect really paid to that most useful of all stalking-horses, an English jury: the gorgeous idol, under whose convenient mantle so many abuses lodge themselves. Such is the respect really paid, even in criminal causes, to the accommodating maxim, to the flexible, the truly Lesbian rule, *nemo tenetur seipsum prodere*.

On every man, obligation to betray himself: to every man, encouragement at the same time to perjure himself. Such is the state of things, as often as, in regard to a disputed question, affidavit evidence is received.

8. Coeval, or not much short of coeval, with the practice on jury trials which admits not of the putting a question to either party in the cause, is the practice of the equity courts, by which, to so great an extent, the proceedings in the causes in which juries are employed are obstructed or overruled:—not to speak of the wide-extending class of demands of which equity alone takes cognizance, the all-sufficient power of common law not affording to these rights so much as the semblance of a remedy.

But in no one instance whatever was any cause heard in equity, but,—in and by the very instrument (the bill) in and by which the demands of the plaintiff are signified,—the

endant is called upon to betray himself, as truly as it is possible for a man to be called upon to betray himself. The questions being put in writing, time is indeed given him to meditate and concert safe perjury, as in the case of affidavit evidence. Answer he must, or, when he has been plagued and squeezed sufficiently in other ways, his silence is taken for an answer in the affirmative; the bill is taken *pro confesso*; and that which to his prejudice the plaintiff prays may be done, is done.

*Lawyer.* But equity causes are but civil causes. Admitting this to be the practice in equity, it is not, for this instance at least, the less true, that no man is bound to criminate himself.

*Non-Lawyer.* True, equity causes are but civil causes: so that, by the effect of the question put to him, a man is not exposed to lose more than his whole estate. But of that estate the value may amount to any number of hundreds of thousands of pounds, sums which now-a-days are running on to millions. In a cause denominated a criminal cause, did you ever, in the whole course of your practice, know an instance of a man's suffering a loss to the amount of two thousand pounds? Were the option your own, to which of two losses would you give the preference: to a loss of 2,000*l.*, to be taken from you in a cause called a criminal cause, or to a loss of 200,000*l.*, to be taken from you in a cause called a civil cause?

Contradictions in substance are not to be reconciled by words. The jurisdiction of the equity is civil merely: be it so; for

*civil* is but a word. But if *vexation* or *no vexation* is the issue; if feelings themselves, not the words employed in speaking of them, are to be regarded;—the quantity of vexation to which a man may thus be made to subject himself by his testimony, when extracted from him by this court of purely civil jurisdiction, surpasses by a great deal the utmost quantity of vexation of the same kind, to which he could be subjected were his testimony extracted from him with a view to punishment, to be inflicted upon him under the name of punishment, in a court of criminal jurisdiction, where either *attachment* or *information*, and in perhaps the greater part of the cases in which *indictment*, is the name given to the suit.

Taking the ends of justice for the standard, here we see a tissue of inconsistencies. Viewing as the sole ends in pursuit the established ends of judicature, all inconsistency vanishes.

The parties examining one another *vivâ voce*, and at the outset, in the presence of the judge, as in a court of conscience; so far no pretence for fees, no more than in a court of conscience: no delay, no pretence for delay, no motives for producing delay, no more than in a court of conscience. Set them to fight with affidavits manufactured by attorneys, fees spring up in plenty. Affidavits the seed, perjuries and fees, like rye-grass and clover, spring up together.

Set them to examine one another in the epistolary style, as in and by a bill in equity, (that is to say, a pair of bills, a bill and a cross bill), the examination takes up twice or three times as many months, as in a court of conscience it would have taken minutes. The pro-

lific examination, crawling on for ten, fifteen, or twenty months, fees pullulating from it all the time. A suit in equity, perhaps, to do nothing but get the evidence; and then a suit at common law, six, twelve, or eighteen months, to give employment to the evidence.

## CHAPTER V.

EXAMINATION OF THE CASES IN WHICH  
ENGLISH LAW EXEMPTS ONE PERSON FROM  
GIVING EVIDENCE AGAINST ANOTHER.SECT. I.—*The exemption improper.*

IF the testimony of a party to his own prejudice ought to be compellable, so ought that of any other person. If the vexation of which it might be productive to Reus to contribute by his *own* evidence to subject himself to the obligations of justice, affords no sufficient reason for the dissolving of these obligations; still less can any good reason be drawn from the vexation resulting from that same source, for depriving justice of the benefit of any *other* testimony.

This sort of second-hand vexation, reflected from the former, must be of one or other of two descriptions: the seat of it, in the bosom of one or other of two persons.

Is it in consideration of the vexation that Reus himself would suffer, from the prejudice that might accrue to him from the evidence of Amicus; is it for this reason, that justice should be deprived of the benefit of Amicus's testimony?

But it will hardly be said, that a man's suf-

ferings will be greater, at seeing evidence to his prejudice extracted from another bosom, than at feeling it extracted from his own.

Is it in consideration of the vexation that Amicus would suffer, from the thought of the prejudice that might accrue from his evidence to Reus; is it for this reason that justice should be deprived of the benefit of the testimony of Amicus?

But it will hardly be said, that a man's sufferings will be greater at the idea of an evil considered as about to befall another person, (whether from his own instrumentality, or from any other cause), than at the idea of the same evil, of an evil the same in magnitude (probability and proximity considered), as about to fall upon himself.

*Secus*, if Reus and Amicus were Nisus and Euryalus. But Reus and Amicus are not Nisus and Euryalus; they are average men. It is not to fabulous, nor yet to extraordinary characters, but to ordinary ones, that the provisions of the legislator ought to be adapted.

Suppose such a plea admitted; observe the consequence. By what criterion shall the degree of sympathetic sensibility on the part of Amicus be determined? By what sure token, open to the eyes and estimation of the judge, shall it be discovered that the fate of Reus is in any degree an exciting cause of the affection in question, in the breast of Amicus? From the ties of blood? The presumption is strong; but unhappily not so strong as to be conclusive. From any other ties? The presumption is weaker and weaker *ad infinitum*.

Admitted, the plea would put into the hands

of the judge, at least with the concurrence of the proposed witness, the faculty of excluding or admitting any man's testimony at pleasure. The sentimental candidate for exclusion, what in this case should he do? Should he speak, and weep, and faint for himself? or see counsel to speak, and weep, and faint for him?

SECT. II.—*Lawyer and Client.*

ENGLISH judges have taken care to exempt the professional members of the partnership from so unpleasant an obligation as that of rendering service to justice. "Counsel and attorneys ought not to be" (say rather *are not*) "permitted to give evidence of any facts communicated to them by their clients in the practice of their profession."\*

On which of the two above-mentioned grounds does the exemption rest in those learned bosoms? Is it that the client would suffer so much more from being hurt by his lawyer's testimony than by his own? Or that a man is so much dearer to his advocate and his attorney, than to himself?

The oracle has given its response: "The privilege is that of the client, not of the attorney."†

When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court, might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law

\* Bull. N. P. 284. from Str. 140. Lindsay and Talbot.

† Ibid.

adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act.

An immoral sort of act, is that sort of act, the tendency of which is, in some way or other, to lessen the quantity of happiness in society. In what way does the supposed cause in question tend to the production of any such effect? The conviction and punishment of the defendant, he being guilty, is by the supposition an act the tendency of which, upon the whole, is beneficial to society. Such is the proposition which for this purpose must be assumed. Some offences (it will be admitted by every body) are of that sort and quality, that the acts by which they are punished do possess this beneficial tendency. Let the offence in question be of the number: it is of such only as are of that number that I speak. The good, then, that results from the conviction and punishment, in the case in question, is out of dispute: where, then, is the additional evil of it when produced by the cause in question? Nowhere. The evil consists in the punishment: but the punishment a man undergoes is not greater when the evidence on which the conviction and punishment are grounded happens to come out of the mouth of a law adviser of his, than if it had happened to come out of his own mouth, or that of a third person.

But if such confidence, when reposed, is permitted to be violated, and if this be known, (which, if such be the law, it will be), the consequence will be, that no such confidence

will be reposed. Not reposed?—Well: and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have any thing to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be,—Remember that, whatever you say to me, I shall be obliged to tell, if asked about it. What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present.

- Except the prevention of such pernicious confidence, of what other possible effect can the rule for the requisition of such evidence be productive? Either of none at all, or of the conviction of delinquents, in some instances in which, but for the lights thus obtained, they would not have been convicted. But in this effect, what imaginable circumstance is there that can render it in any degree pernicious and undesirable? None whatever. The conviction of delinquents is the very end of penal justice.

Observe the inconsistency between the rule in the case of the particular species of contract in question, and the rules observed in general in respect to contracts. Of contracts in general the fulfilment is beneficial to society: of contracts in general the fulfilment is accordingly enforced. But there are some contracts the

fulfilment of which would be pernicious to society: every crime, every offence, supposing the prohibition put upon it by the law to be well grounded, affords an example, viz. that of a contract for the joining in the commission of such offence. The contract between a delinquent and his law adviser, is a contract which has for its object the enabling the delinquent to escape the punishment which is his due. With what consistency, to what end, would the law seek to enforce a contract to such an effect? Suppose a like contract between a delinquent and his jailor; a contract, the object of which shall be to enable the delinquent to escape. Does the law seek to enforce this sort of contract? No, not any where. But why not? It might, with as much reason as in the other case.

If the law adviser, of his own motion, the law neither commanding nor forbidding him, were to offer his testimony for the purpose of promoting the conviction of his client, the imputation of treachery would have, if not a good ground, at any rate a better, a more plausible ground. But the question is not, whether the lawyer shall thus offer his testimony; but whether the law shall command it, or authorize him, nay force him, to refuse it.

Compare the law in this case, with the law in the case of treason—misprision of treason. If, knowing of an act of treason committed, a man forbears to give information of it, such forbearance is punished, and certainly not without reason, as a high crime. In the case of the law adviser, the rule now under consideration would probably be deemed applicable to the crime of

treason, as well as to all others. The law in this case finds a man in whom it protects that very species of conduct which it punishes in every other man: and that species of conduct a mischievous one; one of which the effects cannot but be pernicious. To what end, with what consistency, can the law find out a man to receive with safety, and even under an obligation of concealment, that confidence, that pernicious confidence, which it punishes in every other man?

Another inconsistency. To confidants taken from other professions, neither the obligation nor the permission of secrecy, as against justice, extends. A physician, a surgeon, is compelled to disclose what may operate towards the conviction of his patient.

To the credit of the judges of latter times, this superstition appears to have been not much to their taste: by decision after decision they have pared it down and narrowed it, to a very considerable degree. From a counsel, from an attorney, evidence may be extracted of facts which came to their knowledge before they were retained:\* of facts disclosed to them by the client after the suit was at an end by compromise:† of facts which, though falling under their cognizance no otherwise than in consequence of their professional intercourse with their client, were not directly communicated and confessed by him:‡ of facts which, though coming to their cognizance in consequence of

\* Hawkins, § 84.

† Ibid. § 90.

‡ Viz. that a deed erased had been in a different plight. Ibid. § 86.

such intercourse, might (it is said) have come to their cognizance without it.\*

In a word, so fine has the hair been split, that, when an attorney has been consulted with, not (it is said) as an attorney, but only as a friend, evidence of the facts that come under his cognizance has been extracted from his mouth.† Quære, by what sign to know when it is the attorney who is present, and when it is the friend? In the case of the counsel, there might have been less difficulty: the professional robe, by being off or on, might distinguish the counsel from the friend.

Hawkins,‡ speaking to the question, "What kind of receipt of a felon will make the receiver an accessory after the fact?" says, "It seems agreed that, generally, any assistance whatever given to one known to be a felon, in order to hinder his . . . suffering the punishment to which he is condemned, is a sufficient receipt for this purpose." (By the word *condemned* he means no more than doomed by the general disposition of the law, not *condemned* in consequence of a particular prosecution instituted: for in all the examples he gives, the assistance spoken of is given before prosecution.) The lawyer who, knowing from the confession of his client that such client has committed a felony, enables him by his counsel to avoid "suffering the punishment

\* To prove that the client was the same person who took an oath, for which he is under an indictment for perjury: so also to prove the handwriting of the client to a note or other instrument.

† Hawkins, § 91.

‡ Cap. 29. § 26. vol. iv. p. 209.

“ to which he is condemned,” is, according to the above definition, an accessory to such felony; viz. an accessory after the fact. In practice he certainly would not be deemed so. What I mention the case for, is to shew the inconsistency. In the case of the law adviser, the “ policy,”\* as it is called, of the law, is to protect that sort of man in affording to a crime that very sort of assistance, the giving of which it punishes in any other sort of man,—punishes, and even to such a degree as to treat him as an accomplice. In a case like this, it would certainly be too much to punish the law adviser as an accomplice, for lending his advice (which is his mode of assistance) to a guilty client, or for not spontaneously disclosing such lights towards the ascertainment of his guilt, as it has happened to him to collect. It might deter the lawyer from lending his assistance to an innocent person when accused, by the fear of being involved in the punishment in case of his proving guilty. But to what use, or with what consistency, forbid his disclosing any such proof of guilt, even though called upon so to do?

A distinction, which seems an important one, is one of which I see no traces in the books. The confidence supposed to be reposed in the law adviser,—is it reposed after prosecution, for the purpose of the guilty party's being enabled to escape the punishment due to his guilt? or is it reposed before prosecution,—reposed (suppose) while the offence is in contemplation, and in the view of learning the

\* Hawkins's Leach, iv. 434 : b. iv. c. 46. § 84.

means of committing it with impunity and success? In the former case, the relation of the law adviser to the offence, in case of criminal consciousness on his part, is that of an accessory after the fact; in the other, that of an accessory before or during the fact; that sort of accessory who, in the technical language of the law, is in many cases termed a principal. I say, in case of criminal consciousness: for, from the circumstance of an attorney's having it in his power to give evidence, the effect of which, added to other evidence, may be to give birth to the conviction of his client in respect of a crime or other offence,—it does not follow by any means that there must have been any criminal consciousness on his part; that the picture of the transaction should have been present to his mind, clothed with all those circumstances the union of which is necessary to the constituting it a crime. In case of perjury (for example), the attorney may have learnt from his client the existence of a fact incompatible with another fact, the existence of which the client has averred upon oath, but without having heard of his ever having made any such averment: or, *vice versâ*, he may have been privy to the making of such averment upon oath, without having ever received information, either from the client or any body else, of the existence of the fact by which such averment is demonstrated to be perjurious.

“A counsel, solicitor, or attorney, cannot conduct the cause of his client” (it has been observed) “if he is not fully instructed in the circumstances attending it: but the client”

(it is added) "could not give the instructions " *with safety*, if the facts confided to his advocate were to be disclosed."\* Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it.

This being the professed object of the English system of law, as well as of every other system of law, viz. the prevention of offences; is it reconcilable to the idea of wisdom or consistency, that it should lay down a rule, the effect of which, without contributing to the protection of the innocent, or preventing vexation in any other shape, is purely and simply to counteract its own designs?

In vain would it be to impute the favouring of treachery to a regulation by which such disclosures were to be made obligatory. In saying, "a criminative fact, stated by a delinquent to his law adviser, shall, if called for, be disclosed by him in evidence," it gives sufficient warning to offenders not to seek for safety in such means.

Thus much as to the case where the effect of the disclosure may be to subject the client to suffer as for an offence. Where the effect of it does not go beyond the subjecting him to some

\* Peake on Evidence, p. 126.

non-penal obligation to which he otherwise might not be subjected, or to debar him from some right of which he otherwise might have come into possession, or remained possessed,—the objection is no more reconcilable with the main object of the law than in the other case. In every such case, though by a process grievously and unnecessarily dilatory and expensive,\* what the law does, or to be consistent ought to do, is to compel each party, out of his own mouth, (or, to speak literally, by his own hand,) to make disclosure of such facts as, lying within his own knowledge, are of a nature to contribute towards substantiating the claim of the adversary. Can there be any reason why that information, which he is compelled to give by his own hand, should not be obtained with equal facility from another hand, from which, if there be any difference, it may be extracted with less reluctance? Disclosure of all legally-operative facts, facts investitive or divestitive of right, of all facts on which right depends,—such, without any exception, ought to be, such, with a few inconsistent exceptions, actually is, the object of the law. On the part of the individuals of all descriptions by whom information to such effect happens in each instance to be possessed, the two species of behaviour by which the fulfilment of this design may be counteracted in such instance, are falsehood and concealment. If falsehood is not favoured by the law, why should concealment? a mode of conduct which, without the guilt, (at least in

\* A bill in equity.

as far as guilt is measured by punishment), is attended, so far as it takes place, with the same pernicious and undesirable effect.

Concealment of those facts, the knowledge of which is necessary to the fulfilment of the predictions delivered by the substantive branch of the law, is a mode of conduct punished in some instances as an offence, and even as a crime. The least that can be required by consistency is, that the species of fraud thus punished in some cases, should not in any case be protected and encouraged.

To give encouragement to the spirit of chicane, is an imputation which, on here and there an occasion, men are bold enough to cast upon the general complexion of the law, though not in a hundredth part of the instances in which a just warrant might be found for it. An objection to a proposition in which any such term as chicane is the characteristic word, is, that it is indistinct and vague. The rules of the class of that against which I have been here contending, may serve at once to fix the import, and to exemplify the ground of it.

Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.

Idle as a reproach,—as a memento this ought never to be out of mind. It is thus, and thus only, that it can be visible to the legislator, where to look for opposition, and where, if any where, for assistance.

[*Farther Remarks by the Editor.*]

In the notice of the *Traité des Preuves Judiciaires*, in the Edinburgh Review,\* the rule which excludes the testimony of the professional assistant, is with much earnestness defended. The grounds of the defence, in so far as they are intelligible to me, reduce themselves to those which follow :

1. The first argument consists of two steps, whereof the former is expressed, the latter understood; and either of them, if admitted, destroys the other. The proposition which is asserted is, that the aid which is afforded to an accused person by his advocate, is of exceedingly great importance to justice. The proposition which is insinuated is, that of this aid he would be deprived, if his advocate were rendered subject to examination.—If the only purpose, for which an advocate can be of use, be to assist a criminal in the concealment of his guilt, the last proposition is true : but what becomes of the former? If, on the other hand (as is sufficiently evident) an advocate be needful on other accounts than this,—if he be of use to the innocent, as well as to the guilty, to the man who has nothing to conceal, as well as to the man who has; what is to hinder an innocent, or even a guilty defendant, from availing himself of his advocate's assistance for all purposes, except that of frustrating the law?

2. The second argument consists but of one proposition : it is, that Lord Russell's attorney would have been a welcome visitor, with his

notes in his pocket, to the office of the solicitor of the Treasury. To the exalted personages, whose desire it was to destroy Lord Russell, any person would, it is probable, have been a welcome visitor, who came with information in his pocket tending to criminate the prisoner. From this, what does the reviewer infer? That no information tending to criminate the prisoner should be received? That the truth should not, on a judicial occasion, be ascertained? Not exactly: only that one means, a most efficient means, of ascertaining it, should be rejected. Are we to suppose, then, that on every judicial occasion the thing which is desirable is, that the laws should not be executed? then, indeed, the reviewer's conclusion would be liable to no other objection than that of not going nearly far enough; since all other kinds of evidence might, and indeed ought, on such a supposition, to be excluded likewise.

So long as the law treats any act as a crime which is not a crime, so long it will, without doubt, be desirable that some acts which are legally crimes should escape detection: and by conducing to that end, this or any other exclusionary rule may palliate, in a slight degree, the mischiefs of a bad law. To make the conclusion hold universally, what would it be necessary to suppose? Only that the whole body of the law is a nuisance, and its frustration, not its execution, the end to be desired.

Laws are made to be executed, not to be set aside. For the sake of weakening this or that bad law, would you weaken all the laws? How monstrous must that law be, which is not better

than such a remedy! Instead of making bad laws, and then, by exclusionary rules, undoing with one hand a part of the mischief which you have been doing with the other, would it not be wiser to make no laws but such as are fit to be executed, and then to take care that they be executed on all occasions?

3. The third argument is of that ingenious and sometimes very puzzling sort, called a dilemma. If the rule were abolished, two courses only, according to the reviewer, the lawyer would have: he must enter into communication with the opposite party from the beginning, to which course there would be objections; or he must wait till he had satisfied himself that his client was in the wrong, and must enter into communication with the opposite party *then*; to which course there would be other objections. What the force of these objections may be, it is not necessary, nor would it be pertinent, to inquire: since neither justice nor Mr. Bentham demand that he should enter into communication with the opposite party at all. What is required is only, that if, upon the day of trial, the opposite party should choose to call for his evidence, it may not be in his power, any more than in that of any other witness, to withhold it.

One would not have been surprised at these arguments, or even worse, from an indiscriminate eulogizer of "things as they are;" this, however, is by no means the character of the writer of this article: it is the more surprising, therefore, that he should have been able to satisfy himself with reasons such as

the three which we have examined. Not that these are all the reasons he has to give: the following paragraph seems to be considered by him as containing additional reasons to the same effect:—

“ Even in the very few instances where the accused has intrusted his defender with a full confession of his crime, we hold it to be clear that he may still be lawfully defended. The guilt of which he may be conscious, and which he may have so disclosed, he has still a right to see distinctly proved upon him by legal evidence. To suborn wretches to the commission of perjury, or procure the absence of witnesses by bribes, is to commit a separate and execrable crime; to tamper with the purity of the judges is still more odious: but there is no reason why any party should not, by fair and animated arguments, demonstrate the insufficiency of that testimony, on which alone a righteous judgment can be pronounced to his destruction. Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity: ‘ let us carve him as a feast fit for the gods, not hew him as a carcass for the hounds.’ Reversing the paradox above cited from Paley, we should not despair of finding strong arguments in support of another, and maintain that it is desirable that guilty men should sometimes escape, by the operation of those general rules which form the only security for innocence.”

In reading the above declamation, one is at a loss to discover what it is which the writer is aiming at. Does he really think that, all other things being the same, a system of procedure is the better, for affording to criminals a chance of escape? If this be his serious opinion, there is no more to be said; since it must be freely admitted that, reasoning upon this principle, there is no fault to be found with the rule. If it be your object not to find the prisoner guilty, there cannot be a better way than refusing to hear the person who is most likely to know of his guilt, if it exist. The rule is perfectly well adapted to its end: but is that end the true end of procedure? This question surely requires no answer.

But if the safety of the innocent, and not that of the guilty, be the object of the reviewer's solicitude; had he shewn how an innocent man could be endangered by his lawyer's telling all he has to tell, he would have delivered something more to the purpose than any illustration which the subject of carcasses and hounds could yield. If he can be content for one moment to view the question with other than fox-hunting eyes, even he must perceive that, to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subjected to examination.

"There is no reason why any party should not, by fair and animated arguments, demonstrate the insufficiency of that testimony, on which alone a righteous judgment can be pronounced to his destruction." This, if I rightly

understand it, means, that incomplete evidence ought not, for want of comments, to be taken for complete: we were in no great danger of supposing that it ought. But the real question is,—should you, because your evidence is incomplete, shut out other evidence which would complete it. After the lawyer has been examined, is the evidence incomplete notwithstanding? then is the time for your “fair and animated arguments.” Is it complete? then what more could you desire?

The denunciation which follows, against *hunting down* human beings without respect for the laws of the chase, is one of those proofs which meet us every day, how little, as yet, even instructed Englishmen are accustomed to look upon judicature as a means to an end, and that end the execution of the law. They speak and act, every now and then, as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play: in a word, that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance.

I had almost omitted the most formidable argument of all, which was brought forward by M. Dumont, not as decisive, but as deserving of consideration, and which the reviewer, who adopts it, terms “a conclusive *reductio ad absurdum*.” This consists in a skilful application of the words *spy* and *informer* (espion, délateur), two words forming part of a pretty extensive assortment of vaguely vituperative expressions, which possess the privilege of

serving as conclusive objections against any person or thing which it is resolved to condemn, and against which, it is supposed, no other objections can be found.

Spies and informers are bad people; a lawyer who discloses his client's guilt is a spy and an informer; he is therefore a bad man, and such disclosure is a bad practice, and the rule by which it is prohibited is a good rule. Such, when analysed into its steps, is the argument which we are now called upon to consider.

But to form a ground for condemning any practice, it is not enough to apply to the person who practises it an opprobrious name: it is necessary, moreover, to point out some pernicious tendency in the practice; to shew that it produces more evil than good. It cannot be pretended that the act of him, who, when a crime comes to his knowledge, (be it from the malefactor's own lips, or from any other source), being called upon judicially to declare the truth, declares it accordingly, is a pernicious act. On the contrary, it is evident that it is a highly useful act: the evil occasioned by it being, at the very worst, no more than the punishment of the guilty person; an evil which, in the opinion of the legislature, is outweighed by the consequent security to the public. Call this man, therefore, an informer or not, as you please; but if you call him an informer, remember to add, that the act which constitutes him one, is a meritorious act.

M. Dumont expresses an apprehension that no honourable man would take upon him the functions of an advocate, if compelled to put on

what he is pleased to call the character of an informer. Further reflection would, I think, have convinced him that this apprehension is chimerical. There is scarcely any thing in common between the two characters of an informer and of a witness. The antipathy which exists against the former extends not to the latter. A witness, as such, does not take money for giving evidence, as an informer frequently does for giving information. The act of an informer is spontaneous: he is a man who goes about of his own accord doing mischief to others: so at least it appears to the eyes of unreflecting prejudice. The evidence of the witness may be more fatal to the accused than the indications given by the informer; but it has the appearance of not being equally spontaneous: he tells what he knows, because the law compels him to say something, and because being obliged to speak, he will speak nothing but the truth: but for any thing that appears, if he had not been forced, he would have held his tongue and staid away. An honourable man, acting in the capacity of an advocate, would, by giving true evidence, incur the approbation of all lovers of justice, and would not incur the disapprobation of any one: what, therefore, is there to deter him? unless it be a hatred of justice.

The reviewer adds, that M. Dumont's argument "might be assisted with a multiplicity of reasonings:" these, as he has not stated them, Mr. Bentham, probably, may be pardoned for being ignorant of. The reviewer is modest enough to content himself with the "single

and very obvious remark, that the author evidently presumes the guilt from the accusation :” a remark which could have had its source in nothing but the thickest confusion of ideas. Had Mr. Bentham recommended condemnation without evidence, or any other practice which would be indiscriminately injurious to all accused persons, innocent or guilty; it might then have been said of him, with some colour of justice, that he presumed the guilt from the accusation. But when, of the practice which he recommends, it is a characteristic property to be a security to the innocent, a source of danger to the guilty alone,—under what possible pretence can he be charged with presuming the existence of guilt?—though he may be charged, sure enough, with desiring that where there is guilt, it may be followed by punishment; a wish probably blameable in the eyes of the reviewer, who thinks it “desirable that guilty men should sometimes escape.”

Thus weak are all the arguments which could be produced against this practice, by men who would have been capable of finding better arguments, had any better been to be found. It may appear, and perhaps ought to appear, surprising, that men generally unprejudiced, and accustomed to think, should be misled by sophistry of so flimsy a texture as this has appeared to be. Unhappily, however, there is not any argument so palpably untenable and absurd, which is not daily received, even by instructed men, as conclusive, if it makes in favour of a doctrine which they are predetermined to uphold. In the logic of the schools, the premises prove the conclusion. In

the logic of the affections, some cause, hidden or apparent, having produced a prepossession, this prepossession proves the conclusion, and the conclusion proves the premises. You may then scatter the premises to the winds of heaven, and the conclusion will not stand the less firm:—the affections being still enlisted in its favour, and the shew, not the substance, of a reason being that which is sought for,—if the former premises are no longer defensible, others of similar quality are easily found. The only mode of attack which has any chance of being successful, is to look out for the cause of the prepossession, and do what may be possible to be done towards its removal: when once the feeling, the real support of the opinion, is gone, the weakness of the ostensible supports, the so called reasons, becomes manifest, and the opinion falls to the ground.

What is plainly at the bottom of the prepossession in the present case, is a vague apprehension of danger to innocence. There is nothing which, if listened to, is so sure to mislead as vague fears. Point out any specific cause of alarm, any thing upon which it is possible to lay your hand, and say, from this source evil of this or that particular kind is liable to flow; and there may be some chance of our being able to judge whether the apprehension is or is not a reasonable one. Confine yourself to vague anticipations of undefined evils, and your fears merit not the slightest regard: if you cannot tell what it is you are afraid of, how can you expect any one to participate in your alarm? One thing is certain: that, if there be any reason for fear, that reason must be

capable of being pointed out: and that a danger which does not admit of being distinctly stated, is no danger at all. Let any one, therefore, ask himself, — supposing the law good, and the accused innocent, — what possible harm can be done him by making his professional assistant tell all that he knows?

He may have told to his lawyer, and his lawyer, if examined, may disclose, circumstances which, though they afford no inference against him, it would have been more agreeable to him to conceal. True; but to guard him against any such unnecessary vexation, he will have the considerate attention of the judge: and this inconvenience, after all, is no more than what he may be subjected to by the deposition of any other witness, and particularly by that of his son, or his servant, or any other person who lives in his house, much more probably than by that of his lawyer.

Whence all this dread of the truth? Whence comes it that any one loves darkness better than light, except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as the enemy of innocence, — as scattering its punishments with so ill-directed and so unsparing a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them than the most abandoned of malefactors? Whether the law be really in this state, I will not take upon myself to say: sure I am, that if it be, it is high time it should be amended. But if it be not, where is the cause of alarm? In men's consciousness of their own improbity. Children and servants hate tell-tales; thieves hate

informers, and peaching accomplices ; and, in general, he who feels a desire to do wrong, hates all things, and rules of evidence among the rest, which may, and he fears will, lead to his detection.

Thus much in vindication of the proposed rule. As for its advantages, they are to be sought for not so much in its direct, as in its indirect, operation. The party himself having been, as he ought to be, previously subjected to interrogation ; his lawyer's evidence, which, though good of its kind, is no better than hearsay evidence, would not often add any new facts to those which had already been extracted from the lips of the client. The benefit which would arise from the abolition of the exclusionary rule, would consist rather in the higher tone of morality which would be introduced into the profession itself. A rule of law which, in the case of the lawyer, gives an express license to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument. We should not then hear an advocate boasting of the artifices by which he had trepanned a deluded jury into a verdict in direct opposition to the strongest

evidence; or of the effrontery with which he had, by repeated insults, thrown the faculties of a *bonâ fide* witness into a state of confusion, which had caused him to be taken for a perjurer, and as such disbelieved. Nor would an Old Bailey counsel any longer plume himself upon the number of pickpockets whom, in the course of a long career, he had succeeded in rescuing from the arm of the law. The professional lawyer would be a minister of justice, not an abettor of crime; a guardian of truth, not a suborner of mendacity: and not at *his* hands only, in another sphere, whether as a private man or as a legislator, somewhat more regard for truth and justice might be expected than now, when resistance to both is his daily business, and, if successful, his greatest glory; but, through his medium, the same salutary influence would speedily extend itself to the people at large. Can the paramount obligation of these cardinal virtues ever be felt by them as it ought, while they imagine that, on such easy terms as those of putting on a wig and gown, a man obtains, and on the most important of all occasions, an exemption from both?

SECT. III. — *Trustee and cestuy que trust.*

ON the subject of *trust-prejudicing* evidence, the decision, if not quite so simple as in the preceding cases, will be grounded on considerations not less conclusive.

The testimony being that of the trustee; whose are the feelings, in consideration of which the testimony in this case can be pro-

posed to be excluded? The feelings of the *cestuy que trust*, the *fidei-committee*, to whose prejudice it redounds? But if the testimony thus proposed to be called for, were his own, no vexation of which the obligation could be productive, could form any sufficient ground for the exclusion of it. Will it be said, that the vexation produced in his breast by perceiving the evil in question brought on him by the testimony of another person, his trustee, will be greater than what would be produced by seeing the same evil brought on him by his own testimony? The answer will hardly be in the affirmative: but,—be it on the one side or the other,—in regard to the question of exclusion it is not in the nature of things that it should make any material difference.

Is it in tenderness to the feelings of the trustee, that the proposed wound should be inflicted on the vitals of justice? But the vexation attendant on the delivery of the testimony could never rise to such a pitch as to constitute a sufficient ground for the exclusion of it, although it were on the deponent's *own* head that the evil were to fall: much less where the head of *another* person is the head to bear it. Will the prospect of the suffering of the *cestuy que trust* be more insupportable to the trustee than if it were his own? Good, as between Nisus and Euryalus, Nisus being trustee. But our trustee is no hero; neither of an epic poem, nor a romance, nor even of real life. He is an average man: an exact likeness may be seen of him in the *Propositus* of Blackstone and Lord Coke.

Putting together the self-regarding feelings

of the suffering *cestuy que trust*, and the sympathetic feelings of the trustee, will they by their joint force constitute a sufficient ground for the exclusion? That nothing may be overlooked, even this case shall undergo examination. Be it ever so strong, it will never be strong enough to support the exclusive rule. That practical point settled, the speculative question, whether the effect of the decomposition will be on the side of diminution or increase, may be left to take its chance.

The case of trusteeship, at least in the common as well as technical import of the word, will not rise above the level of that sort of evidence which, were it self-regarding, would fall under the denomination of self-operative evidence: it will not rise to the level of self-criminating. It has never been proposed that, on the ground of his being trustee for a thief or murderer, a man should be exempt from the obligation of delivering testimony tending to convict such thief or murderer of his crime. In this more afflictive case, however, the ground for exclusion is, in proportion to the difference in point of afflictiveness, stronger than in the less afflictive case, where the loss of money or money's worth would constitute the worst evil that could be made to fall on the *cestuy que trust* by the testimony of the trustee.

#### SECT. IV.—*Husband and Wife.*

THE question, of which the species of evidence, for the designation of which the epithet *family-peace-disturbing* has been appointed, is the subject, is a question in no small degree

complicated. The necessity of grappling with it, owes its birth to the arrangements made on this subject by English jurisprudence.

Whatsoever be the relations (natural or factitious, temporary or perpetual) subsisting between a number of persons living together in the compass of the same family,—relations between husband and wife, parents and children, masters or mistresses and servants, house-keepers and inmates,—any event by which the emotion of ill-will is produced in any one of them towards any other, may, *pro tanto*, be said to operate to the disturbance of the family peace: and ill-will being a bad thing, and peace a good thing, the more effectually any disturbance can by any arrangement of law be prevented from being given to it, so much the better. Disturbance of the peace of a family is vexation; and of vexation, if not necessary to the averting of a preponderant vexation, the production ought always to be avoided.

That,—testimony being delivered by a person standing in any one of these relations, such as to operate to the prejudice of the person standing in the opposite and corresponding relation,—vexation will be likely enough to be produced in the breasts of both, is manifest enough. But in any of these instances, ought such vexation to be considered as forming a sufficient ground for the exclusion of the testimony? Over and over again, the answer has been already made.

The case of husband and wife is the only sample which will here be taken, being the only one which is taken in English law for the ground of an exclusionary rule.

To present a distinct conception, the evil of the vexation capable of flowing from this source must, in the first place, be decomposed.

Evil flowing from sympathy, evil flowing from antipathy or ill-will :—to one or other of these two elements, the whole evil of the mixed mass may be referred.

1. As to the evil from sympathy, it has already been put into the balance, under the head of trust-prejudicing evidence. In the case of husband and wife, whether considered on the part of the male or on the part of the female, the affection of sympathy may naturally be considered as operating with greater, much greater, force, than in the case of an average trustee. On the other hand, a point not to be overlooked, is, that the opposite affection, (and that acting with a force proportioned to the mutual vicinity of the two parties, and to the inflexibility of the ties of various kinds by which they are connected), is no less capable of finding a place. Yet, after all allowances made, it will not be less true, that, as between an average husband and an average wife,—as between Baron and Feme in the character of Propositus and Proposita,—an affection of the sympathetic kind cannot in reason but be considered as subsisting, and in a degree of force exceeding that which can reasonably be considered as subsisting on either side, as between an average trustee and his average *cestuy que trust*.

Justice thus done to all parties; the propriety of admission in this case, and the impropriety of the exclusionary rule, considered as placed on the ground of sympathy, will not be the less unquestionable.

With all possible disposition to do justice to the conjugal affection maintained on the one hand in the breast of Propositus by the amiable qualities of Proposita, on the other hand in the bosom of Proposita by the estimable qualities of Propositus,—it seems difficult to avoid admitting, that the affection of Propositus towards Proposita will not be altogether upon a level with the affection of the same Propositus for his earlier and still more intimate acquaintance, himself: and no less so as between the affection of Proposita towards Propositus on the one hand, and the affection of the same Proposita towards the amiable partner of Propositus on the other. For, let it not be forgotten, that the bosoms to which the thermometer is for this purpose to be applied, are the bosoms of Propositus and Proposita, not of Arria and Pætus, any more than of Nisus and Euryalus in the other case.

Thus much seemed necessary, yet not more than necessary, to give the corrective requisite for reducing to the standard of plain and ordinary nature the heroic dimensions given to the conjugal flame by the sentimentality of English lawyers.

As, therefore, vexation on a self-regarding account has been shewn not to be a sufficient ground for exclusion, neither can the image of the same vexation, presented by sympathy.

Turn next to the evil from antipathy.

The law will not suffer the wife to be a witness for or against her husband: this is a proposition put by a reporter into the mouth of the first Earl of Hardwicke. “The reason  
“ is . . . . to preserve the peace of families:

" and therefore I shall never encourage such a " consent."\* Here, by good fortune, we have a distinct proposition, with an assignable author, and he of the first degree of professional respectability.

When, on failure of the beaten track of analogy, we find among the opinions of professional lawyers an argument that wears upon the face of it any connexion with the principle of utility, it consists commonly in a reference to some one head of inconvenience or advantage, no account being taken of any other. But it is of the essence of law to be a choice of evils: including under the notion of evil, the absence or negation of this or that lot of positive good. It will happen, in many cases, that not only there shall be an advantage on one side to set against an inconvenience on the other, but in the one scale there shall be a number of perfectly distinct advantages, weighing against a number of equally distinct inconveniences in the other. A narrow and imperfect lot of reason, is better than a mere caprice, having no relation to good or evil, to pain or pleasure, on either side: but from an imperfect lot of reason, no better than imperfect conclusions can reasonably be expected.

In legislative argumentation it is not uncommon to have a number of reasons, such as they are, all grounded on the principle of utility, adduced on both sides: but in judicial argument, if you get a single article in the shape of an original reason, an indication of convenience

\* Peake, 123. *Barber v. Sir Woolston Dixie*. Cases temp. Hardwick, 264.

or inconvenience, it is a sort of a prize. Cases against cases, *i. e.* decisions against decisions, you will have in plenty; but if you have any thing in the shape of a rational reason,—of a reason referable to the principle of utility,—you will find it stand alone; and a mere allusion, as vague and incompletely expressed as it is possible to conceive, is the shape in which it comes. Hard—hardship—policy—peace of families—absolute necessity:—some such words as these are the vehicles, by which the faint spark of reason that exhibits itself is conveyed. These are the leading terms, and these are all you are furnished with; and out of these you are to make an applicable, a distinct and intelligible proposition, as you can.

Hawkins, one of the best and most comprehensive heads the profession of the law ever possessed, had already taken up the same argument, and added to it another. “Regul-  
“larly, the one shall not be admitted to give  
“evidence against the other,” (husband and wife), “nor the examination of the one be  
“made use of against the other, by reason of  
“the implacable dissension which might be  
“caused by it, and the great danger of perjury  
“from taking the oaths of persons under so  
“great a bias, and the extreme hardship of the  
“case.”\*

\* Lord Coke (C. Litt. 6.) adds a technical reason, truly worthy of the purpose for which it is adduced.

“Note, it hath been resolved by the justices (Parch. 10. Ja. in Com. Banco upon the Stat. of Bankrouths), that a wife cannot be produced either against or for her husband, *quia sunt duæ animæ in carne unâ*; and it might be a cause of implacable discord and dissension between the husband

Implacable dissension is one argument: the same in substance as that which occurred to and weighed with Lord Hardwicke.

Great danger of perjury is another, not stated as having been noticed by Lord Hardwicke.

Of the words "extreme hardship of the case," I cannot make out any argument distinct from the two preceding ones.

These are the reasons for which, not only the wife is not allowed to be called as a witness against her husband, but even her extrajudicial declarations are not admitted in evidence against him, though his own extrajudicial declarations are.

The argument from the danger of perjury arises out of the supposed sympathy, and therefore need scarcely receive any farther notice.

Suffice it to say, that if the danger of perjury be an objection against the calling in the sanc-

and the wife, and a means of great inconvenience." Thus far Lord Coke, the supereminently learned ex-chief justice.

Mr. Justice Buller "thought the rule a very proper one, as it tended to prevent dissensions in families." (2. Term Rep. 268.)

Before that time, in the Treatise on the Law of Nisi Prius by the same learned judge (then but an advocate), the reason had been subtilised and generalised to such a degree as to have lost all meaning: "husband and wife cannot be admitted as witnesses . . . . . against each other, because contrary to the legal policy of marriage." (Bull. Nisi Prius, 286.)

Accordingly, anno 1792, the same learned judge (4. Term Rep.), agreeing with his learned chief Lord Kenyon, is represented as laying down the law on the subject in these words: "It is now considered as a settled principle of law, that husbands and wives cannot, in any case, be admitted as witnesses for or against one another."

tion of an oath in this case, it is an objection against it in all other cases, and an objection that applies to the sanction with the greater force, the greater the need there is of it. If applied to the testimony considered in respect of the danger of falsehood, apart from the consideration of the sanction, it is an objection to all testimony:—if it applies to the case of the wife, considered with respect to her presumable unwillingness to do an act whereby her husband may sustain a prejudice, it applies with still greater force against all the instances in which a man's own testimony is permitted to be called for against himself: it applies to one of the characteristic features of the practice of the courts styled courts of equity.

As to dissension; which, to give force to the argument, is presumed, without the smallest alleged reason, to be implacable;—

The rule, if carried as far as it would go, being altogether destructive of the peace of families,—of that peace, which it is its professed object to protect,—in comes, in consequence, one class of exceptions, and that a very large one.\*

\* Turn back to the *dictum* of Lord Kenyon, in a former note. In this you have a specimen, and that a fair one, of the degree of certainty, reasonableness, and consistency, that pervade the whole of the system of jurisprudential law: of the degree of dependency fit to be placed on the opinions, the dicta, the statements, delivered by the most eminent among the official professors of it; of the regard due to those panegyrics which its professors of all ranks and classes never cease to anoint it with, and from which the opinions entertained of it by students, and even lawyers, are imbibed.

Bad as this branch of the law is in itself, its badness constitutes not by any means the whole of its mischievousness. An additional mischief is, that where, as here, the proposition pos-

In case of an offence involving a personal injury committed by the husband against the wife, the testimony of the wife against the husband is admissible, and admitted in ordinary practice.\*

sesses a certain degree of extent, there is no trusting, with any tolerable degree of safety, to the accounts delivered of it, as it is (*i. e.* as it is said to be): though delivered from the most trustworthy of the hands employed in the dispensation of it.

*Lawyer.* Oh! but, the case of a suit in which one of them alone is party being the case in hand, the proposition is to be understood as being confined in its extent to the ground occupied by that case.

*Non-Lawyer.* Be pleased to look at the words: they expressly exclude all limits: of the testimony of either against the other, the admission cannot take place "*in any case.*"

*Lawyer.* Nay, but there may have been a want of correctness in this part of the report: by the judge, the requisite exception was made; by the reporter it is omitted to be stated.

*Non-Lawyer.* Possible, indeed, just possible, but not probable. Had the rule stood by itself without the reason, then, indeed, you might, with somewhat better grace, have assumed the liberty of imagining clauses to limit the extent of it. But along with the rule, the reason is actually brought to view, and the reason is such as admits not of any the smallest defalcation to be made from that unlimited extent. What? is the danger of future implacable dissension greater, from their being respectively admitted to testify one against the other in a prosecution brought by one against the other, than in a civil suit brought against one of them by a stranger, or by one of them against a stranger?

\* In the case, however, of one of the most cruel of all injuries, a wife is deprived of this remedy.

In the case of a prosecution for bigamy, the evidence of the first wife has been deemed inadmissible, on the ground that she is the only lawful wife. If the fact can be proved without the testimony of the wife, no inconvenience ensues, unless it be a quantity of unnecessary vexation and expense;—vexation to the stranger, who is compelled to take a journey, perhaps, to give his testimony; expense to the prosecutor (or say the prosecutrix) who has to defray the expense of the witness's charges. But what in that case is the inconvenience

When a man has inflicted severe bodily suffering on his wife,—has been in the habit of

saved? an inconvenience scarce worth saving. In the fact of the celebration, the celebration of the original and valid marriage,—in this, taken by itself, there is nothing, the disclosure of which can of itself have the effect of criminating the husband; nothing, of which, either on that or any other account, the statement can naturally be supposed to be attended with any particular uneasiness to the wife. By the supposition, the fact will be proved by other testimony, if her's be not called in to prove it: what material difference can it make to her, whether it be by her testimony or that of any body else? By declaring herself the lawful wife, she does not in any degree sacrifice his character; on the contrary, she supports it. It is not by the first marriage that the disgrace and ruin is thrown upon the guilty husband; it is by the second.

On the other hand, suppose the celebration incapable of being proved by any other evidence; suppose the case such, that for the proving of the celebration no other evidence can be obtained. Here the operation of giving the evidence might be attended with a sensation more or less painful to the injured wife: but on the other hand, what is the consequence if it be rejected? An injury of the most cruel kind that can be sustained, remains without satisfaction of any kind: the crime, a very heavy one, remains unpunished; the criminal triumphs in his guilt.

In the cases that gave rise to the decision, the inducement for calling in the injured wife, was, probably, the wish to save the vexation and expense that would have attended the procurement of other evidence. Had the objection been foreseen, had this ground of exclusion been known to be pre-established, such other evidence would have been resorted to, and that of the wife not employed. But the evidence being deemed inadmissible, the result was, not that the fact was proved by other unexceptionable evidence, but that the fact could not be proved at all, and, in consequence, that the crime was seen to go unpunished. For in a criminal cause, if the determination be in the first instance in favour of the guilty defendant, no omissions can be supplied, no false steps rectified: the example of guilt triumphing in impunity, is the price that, under the reign of common law, must be paid for every point that comes to be established on this side.

[Technical law is never consistent, even in its badness. On

thus filling her life with misery; here is a cause of dissension, which, powerful as it is, experience proves to be by no means implacable. Injuries of the like kind, it will sometimes happen (though, by reason of the usual superiority of force on the male side, not so frequently), shall be inflicted, habitually inflicted, on the husband by the wife. A man forgives the wife who has put him to bodily torture; but it is not in the nature of a man ever to forgive the wife, who, being called upon in a court of justice for the purposes of justice, shall have dared to speak the truth! Where there is injury, and the highest degree of injury, forgiveness is expected, being in every day's experience; where there is no injury, where the supposed cause of offence is a compliance with the injunctions of duty, forgiveness is regarded as altogether hopeless!

To be consistent with itself, the law should strew danger before every step which it could occur to a man to take in the path of criminality. Instead of that, it is the care of the law itself to remove the principal source of danger out of his way. To be consistent with itself, it should remove out of his way every possible assistance that can contribute to en-

a prosecution for bigamy, the first husband or wife is not admissible to prove the fact of the former marriage. But, after a long period of uncertainty, it has been settled as late as the year 1817, that in any collateral suit or proceeding between third persons, the rule is quite different: a person may therefore be incidentally charged with bigamy by the testimony of the first wife or husband, and with the effect of punishment, viz. in the shape of loss of character; a punishment not the less real, for being inflicted by other hands than those of the executioners of the law.—*Editor.*]

gage him in any course of conduct which it reprobates and endeavours to prevent. Instead of that, it secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime.

If the dissension were, in the nature of the case, so implacable as the argument supposes, it should, consistently speaking, operate as a motive with the law to prescribe, rather than exclude, this source of information. If I attempt this crime, it may happen to my wife, from whom I cannot hope to conceal it, to be called upon to bear witness against me : and then,—even if I should escape from the punishment of the law,—the pain of seeing, in the partner of my bed, the once probable instrument of my destruction, will never leave me.

In the days when the exclusive rule in question took its rise, the reason in favour of it operated with a degree of force considerably beyond that with which it acts in these our days. The power of the husband over the wife was much stronger and more absolute. A time there appears to have been, when the exceptions, by which a wife is permitted to seek protection in a court of justice against ill-usage by the husband, were not yet established. Morality was at the same time more loose ; manners more harsh and savage ; resentment, on so unbecoming a ground as that of a submission to the laws of truth and justice, was more likely to be conceived and harboured, more easy to be gratified with impunity, and more apt to be implacable.

A law which should exclude the testimony of the wife in the case of a prosecution against

the husband for ill-usage done to the wife, would be tantamount to authorizing the husband to inflict on the wife all imaginable cruelties, so long as nobody else was present: a condition which, having by law the command in and over his own house, it would in general be in his power to fulfil.

A law which excludes the testimony of the wife, in the case of a prosecution against the husband for mischief done to any other individual, or to the state, is, in like manner, in other words, a law authorizing him to do, in the presence and with the assistance of the wife, every kind of mischief, that excepted by which she herself would be a sufferer. The law, which, in the former case, affords its protection to the wife,—with what consistency can it, in the latter case, refuse its protection to every human creature besides?

So often as the mask has been stripped off, can it be necessary to lay bare the real policy that lies at the bottom of this business?

A cause between Doe and Ux admits as many fees as a cause between Doe and Roe. In a case where there is nobody to swear for Ux, if Ux were not admitted, there would be no cause, no fees. Rule:—admit her evidence.

Very different is the case, where the cause is between one of the married pair, viz. the husband (by whom the cause, in a dispute with a stranger, is in general conducted), and a stranger.

If a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them,—and (if that were

not enough) betrayed and exposed to punishment,—by his wife; injustice in all its shapes, and with it the suits and the fees of which it is prolific, would, in comparison of what it is at present, be rare. Let us, therefore, grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves.\*

Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens), evidence sufficient

\* Advice to judges. When you have a reason to give for a rule or supposed rule of jurisprudential law, copy Mr. Justice Buller; let *policy* be your word; keep to generals; keep to the generalissima among generals. Behold the consequence, the fatal consequence, of descending into particulars; of talking of "*implacable dissension between man and wife*;" you commit yourselves; you give a handle to non-lawyers. They are thus enabled to look into your reasons, and to see whether there be any truth in them. No, never more suffer yourselves to fall into any such snare. Keep to *policy*, and such other arguments as, in the region of the clouds, are of equal altitude, or, if that be difficult, of nearly equal altitude, with it. Keep to *policy*, you are omnipotent. With the word *policy* in your mouths, the law is, what you please to make it: any thing to-day—the same, or any different thing, to-morrow.

King, Lords, and Commons, what drudges in comparison of you! Toiling for a whole session, with committees upon committees, examinations upon examinations, papers upon papers; while to make the law, by declaring it, costs you but a word: you speak the word, the law is made, and every thing is as it should be.

for conviction is obtainable, without having recourse to the testimony of the wife; in the other instance, not without having recourse to the testimony of the wife. While the one suffers,—capitally, if such be the punishment,—to what use, with what consistency, is the other to be permitted to triumph in impunity?

The film of prejudice once removed, a very loose system of morality, or rather (to speak plainly) a system of gross immorality, will be seen to be at the bottom of these exemptive rules. The very crime which it punishes in one man—punishes even with death—it affords its protection to in another. It converts, or seeks to convert, the house of every man, into a nursery of unpunishable crimes. The same age of barbarism and superstition, the same age of relaxed morality, which gave birth to the institution of *asylums*, gave birth (there seems reason to think) to this privilege, which gives to each man a safe accomplice in his bosom. The mischievousness of the domestic asylum goes, however, far beyond that of the asylum commonly so called. The church, churchyard, or monastery, whatever it was, did not afford to the criminal any thing like a complete exemption from all punishment: it was itself a punishment: it was banishment from his family: it included imprisonment, or a degree of confinement so close as to be scarce distinguishable from it: it placed him in a state of penury, humiliation, and dependance.

A rule like this, protects, encourages, inculcates fraud. For falsehood, positive falsehood, is but one modification of fraud: concealment, a sort of negative falsehood, is another: I

mean concealment of any facts, of which, for the protection of their rights, individuals or the public have a right to be informed. The concealment which is authorized by the law, it may be said, ceases to be fraud. No; that it does not: I mean in this case. A concealment which is authorized by the *substantive* branch of the law, cannot be fraudulent: the authorization does away the fraud: what is authorized is legalized: criminality, and legality, are repugnant and incompatible. But the law cannot, without authorizing fraud, authorize by its *adjective* branch, the doing of that which, by its substantive branch, it has constituted a crime. By the punishment annexed to the act by the substantive branch of the law, the law has acknowledged and proclaimed its mischievousness: if the act be not mischievous, the legislator has no warrant for marking it out for punishment. But if the act be mischievous, on what ground, with what consistency, does it in any instance seek to exempt it from punishment, as if it were innocent? exempt it in consideration of a fact purely irrelevant; a fact by which the mischievousness of it is not so much as pretended to be diminished? An article of adjective law which is at variance with the substantive law, is itself a fraud. The substantive branch of the law declares, undertakes, engages, for the benefit of all parties interested, that all persons offending so and so shall be punished so and so. The judicial authority, which, by a law of the adjective kind, of its own making, takes upon itself to exempt a man from such punishment, on a ground by which his case is not varied in point

of guilt, violates that engagement. Fraudulent in itself,—so far as it encourages others to pursue that plan of concealment by which the engagement is violated, it is the cause of fraud in others. By aggregating the act to the class of crimes, and rendering it punishable as such, it declares it to be a mischievous act, and to such a degree as to be a crime. By authorizing an individual to conceal it, in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts, of the mischievousness and criminality of which it shews itself sufficiently sensible on other occasions;—the principal crime, and that concealment of it, which, when the act so concealed is criminal, is itself a crime.

It debases and degrades the matrimonial union; converting into a sink of corruption what ought to be a source of purity. It defiles the marriage-contract itself, by tacking to it in secret a license to commit crimes.

I say in secret; for the probability is, that an institution so repugnant to moral sentiments is not generally known, and, on that account, is not productive of all the mischief, of which, if known universally, it would be productive. No care being taken to enable men to possess themselves of that knowledge, on which their security, in every branch of it, is in a state of continual dependence; the degree of information which they actually have of it, depends upon its natural aptitude for being guessed at. To the knowledge of what, on each head, is law, they have no other clue than such con-

ception as they are led to form to themselves of what it *ought to be*.

Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes!—Think? answers the legislator; yes, indeed, I think of it; and, in thinking of it, what I think of besides, is, what *you* ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? it depends altogether upon yourself: preserve your innocence.

To the legislators of antiquity, the married state was an object of favour: they regarded it as a security for good behaviour: a wife and children were considered as being (what doubtless they are in their own nature) so many pledges. Such was the policy of the higher antiquity. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is, to convert that sacred condition into a nursery of crime.

The reason now given, was not, I suspect, the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one, is the grimgribber, nonsensical reason,—that of the identity of the two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial con-

ditions, this quibble is the fountain of all reasoning.

Among lawyers, among divines, among all candidates setting up for power in a rude age, working by fraud opposed to force, scrambling for whatever could be picked up of the veneration and submission of the herd of mankind,—there has been a sort of instinctive predilection for absurdity in its absurdest shape. Paradox, as far as it could be forced down, has always been preferred by them to simple truth. He who is astonished, is half subdued. Each absurdity you get people to swallow, prepares them for a greater. And another advantage is, the same figure of rhetoric which commands the admiration and obedience of the subject class, helps the memory of the domineering class: it is a sort of *memoria technica*.

All these paradoxes, all these dull witticisms, have this in common,—that, on taking them in pieces, you find wrapped up, in a covering of ingenuity, some foolish or knavish, and in either case pernicious, lie. It is by them that men are trained up in the degrading habit of taking absurdity for reason, nonsense for sense. It is by the swallowing of such potions, that the mind of man is rendered feeble and ricketty in the morning of its days. To burn them all, without exception, in one common bonfire, would be a triumph to reason, and a blessing to mankind.

[Further remarks by the Editor.]

The exclusion of the testimony of husband and wife, for or against each other, is in the number of the exclusions which, in an article

already alluded to, are defended by the Edinburgh Review: "yet not entirely," says the reviewer, "on account of that dread entertained by the English law, of conjugal feuds, though these are frequently of the most deadly character. But the reason just given, in the case of the priest, applies;" (this refers to the opinion of Mr. Bentham, that the disclosure, by a catholic priest, of the secrets confided to him by a confessing penitent, should not be required or permitted) "for the confidence between married persons makes their whole conversation an unreserved confession; and they also could never be contradicted but by the accused: while external circumstances might be fabricated with the utmost facility, to give apparent confirmation to false charges. But our stronger reason is, that the passions must be too much alive, where the husband and wife contend in a court of justice, to give any chance of fair play to the truth. It must be expected, as an unavoidable consequence of the connexion by which they are bound, that their feelings, either of affection or hatred, must be strong enough to bear down the abstract regard for veracity, even in judicial depositions."

Want of space might form some excuse to this writer for not having said more; but it is no apology for the vagueness and inconclusiveness of what he *has* said.

The confidence, say you, between married persons makes their whole conversation an unreserved confession? So much the better: their testimony will be the more valuable. It is a strange reason for rejecting an article of

evidence, that it is distinguished from other articles by its fulness and explicitness.

The reviewer must have read Mr. Bentham very carelessly, to suppose that his reason for excluding the testimony of the priest is, because the discourse of the penitent is an "unreserved confession:" this would be a reason for admitting, not for rejecting, the evidence. The true reason for the exclusion in the case of the confessor, is, that punishment attaching itself upon the discharge of a religious duty would in effect be punishment for religious opinions. Add to which, that the confidence reposed by the criminal in his confessor has not for its object the furtherance, nor the impunity, of offences; but for its effect, as far as it goes, the prevention of them. To seal the lips of the wife gives a facility to crime: to seal those of the confessor gives none; but, on the contrary, induces a criminal to confide the secret of his guilt to one whose only aim will in general be to awaken him to a sense of it. Lastly, it is to be remembered that, by compelling the disclosure in the case of the confessor, no information would ultimately be gained: the only effect being, that, on the part of the criminal, no such revelations would be made. Not so in the case of the wife, who may have come to a knowledge of the crime independently of any voluntary confession by her criminal husband.

That the testimony of the wife could not be contradicted but by the accused person, her husband, and *vice versâ*,—which, if true, would be a good reason for distrusting, but no reason for rejecting their evidence,—is, in the majority

of cases, not true. What the husband and wife have told one another in secret, no one but they two can know; and, consequently, what either of them says on the subject of it, nobody but the other has it in his power to contradict. But is not this likewise the case between the criminal and his accomplice, or between the criminal and any other person, with respect to any fact which occurred when they two were the only persons present? while, with respect to all other facts, the testimony of husband or wife would, if false, be just as capable of being refuted by counter-evidence as the testimony of any other witness.

The aphorism on which the reviewer founds what he calls his "stronger reason," one would not have wondered at meeting with in a German tragedy; but it is certainly what one would never have looked for in a discourse upon the law of evidence. Strange as it may sound in sentimental ears, I am firmly persuaded that many, nay most, married persons pass through life without either loving or hating one another to any such uncontrollable excess. Suppose them however to do so, and their "feelings," whether of affection or of hatred, to be "strong enough to bear down the abstract regard for veracity:" will they, in addition to this "abstract regard,"—a curious sort of a regard,—be strong enough to bear down the fear of punishment and of shame? Will they render the witness proof against the vigilance and acuteness of a sagacious and experienced cross-examiner? Or rather, are not the witnesses who are under the influence of a strong passion, precisely those who, when skilfully dealt with,

are least capable of maintaining the appearance of credibility, even when speaking the truth ; and, *à fortiori*, least likely to obtain credit for a lie !

But I waste time, and fill up valuable space, in arguing seriously against such solemn trifling.

## PART V.

OF THE CASES IN WHICH EVIDENCE HAS  
BEEN EXCLUDED ON THE DOUBLE  
GROUND OF VEXATION AND DANGER OF DECEP-  
TION.

## CHAPTER I.

IMPROPRIETY OF EXCLUDING THE TESTIMONY OF A  
PARTY TO THE CAUSE, FOR OR AGAINST HIMSELF.

Of the case in which the exclusion appears to have rested on a double ground,—that which respects *deception*, and that which respects *vexation*.—one exemplification is constituted by the case in which the testimony in question is that of a *party* to the cause.

Receive his testimony at his own instance, the testimony will be false, and you will be *deceived* by it. Call for it at the instance of his adversary, it will be *hardship* to him to be obliged to give it. Such (it may be presumed) are the reasons, by which the exclusions put upon the evidence of a person bearing this relation to the suit, have been suggested. But, in each instance, the insufficiency of the reason has been already brought to view: nor, though they are applicable to the same person, does the force of either make any addition to that of the other; for wherever the one applies, the other does not.

The consequence is, that there is not an imaginable case in which the testimony of a party, be he plaintiff or be he defendant, ought to be excluded.

At his own instance,—the reason which forbids the admission of the testimony, is weaker in this case than in the case of an interested extraneous witness. The real magnitude of the interest being the same in both cases,—in the case of a party the interest is more palpable: the objection created by it is likely to act with greater force upon the judicial faculties of the magistrate: his mind is more surely open to it: the danger of deception is therefore less.\*

If, in so far as it operates in his own favour, the testimony of the party is liable to be drawn aside from the line of truth by the action of this force, which is so obvious even to the most unobservant eye; in so far as it operates in his disfavour, it possesses, in a degree superior to all other testimony, a claim to confidence. That, in this case, the error, if any there be in the testimony, is not a wilful one,—is not accompanied, at the same time, with a knowledge of the falsity of the information, and of the tendency it has to operate to the deponent's

\* On the other hand, what must not pass unnoticed is, that, supposing the probability of mischief from this quarter were really preponderant, the mischief would in this case be more frequently realized than in the other. Why? Because to gain an undue advantage by the party's single testimony, requires no more than the operation of that one person: whereas, to gain the same advantage by the false testimony of an extraneous witness, requires the co-operation of two persons, the party, and the extraneous witness his accomplice: each of them conscious of guilt; each of them liable to be betrayed by the unfaithfulness or imprudence of the other.

prejudice,—is a proposition the truth of which is far more certain in this instance, than it can be in any other.

Accordingly, as often as the testimony of a party is received—so sure as it enters into the mind of any one who has to judge of it—so sure is it to be analysed, and, as it were, divided into two parts. To the part which is regarded as operating in the deponent's own favour, the incredulous, the diffident part of the judge's mind, applies itself of course: while the part regarded as operating in his disfavour, commands, on the part of the judge, an almost unlimited share of confidence: in a word, what portion of the mass is understood as belonging to this division, is, by the common sense and consent of mankind, universally regarded as the best evidence.

Such is the evidence, of which, on the ideal supposition of extraordinary vexation, the rashness of a certain class of jurists has not hesitated to rob the treasury of justice.\*

\* The Edinburgh Review, in an article which has been several times referred to, makes a long attack upon "the French method of interrogating persons under a charge" with a view to the extraction of their self-criminative testimony. It is not necessary to enter particularly into the objections advanced by the reviewer against this practice. They may all be summed up in two propositions, neither of which seems very likely to be disputed: 1. that an innocent man may very possibly be unable to furnish, all at once, those explanations which are necessary to make his innocence appear; and 2. that, such inability on the part of a prisoner not being conclusive evidence of his guilt, it would be very wrong to treat it as if it were so.

The reviewer does not state whether his objection extends to the examination of the prisoner on the occasion of the *definitive* trial: but we may presume that it does not, since his

A party is not suffered to be examined on his own behalf. Observe the consequence: he

arguments do not apply to that case. By that time, the prisoner may reasonably be supposed to be prepared with all such explanations as the circumstances will admit of; and if he is not, I fear it will go hard with him, whether the insufficient explanations which he does give, are given through his advocate only, or partly from the lips of his advocate and partly from his own.

But, even against the preliminary interrogation of the prisoner as soon as possible after his apprehension, the objections, it is evident, are altogether inconclusive. That non-response and evasive response are strong articles of circumstantial evidence against a prisoner, is what will hardly be denied:—that, by an inconsiderate judge, more than the due weight may be attached to them, is a casualty to which they are liable, in common with all other sorts of circumstantial evidence, but not more liable than other sorts. Were the possibility of deception a sufficient ground for putting an exclusion upon evidence, can it be necessary to say, that no evidence would be admitted at all? But the exclusionists never seem to consider, that if deception may arise from evidence, it is still more likely to arise from the want of evidence.

After all, the reviewer, when he comes to his practical conclusion, explains away the whole effect of his previous arguments, and ends by prescribing “a middle course, which leaves the party to judge and act for himself. If he is blessed with self-command, and is in possession of the means of at once refuting his pursuers, why should his vindication be delayed? but as he may be incompetent to do so, or unprovided with the necessary proofs, let him be calmly told by the magistrate, that no unfair inference will be drawn from his reserving his defence for a more convenient season.”

That *something* of this sort should be told him, is obviously proper; to which I will add, that no promise could be more safely given than a promise not to draw any *unfair* inferences; though it may be doubted how far such an assurance would quiet the alarms of an innocent prisoner, until he should be informed *what* inferences the magistrate would consider unfair. The proper thing to tell him would be, that if, from the unexpectedness of the accusation, he felt his faculties to be in too bewildered a state to qualify him for making a clear statement of the truth (and of this the magis-

is delivered without mercy into the hands of a mendacious witness on the other side. Your adversary, to make evidence for a suit he means to bring against you, sends an emissary to you to engage you in a conversation, that, when called upon as a witness, he may impute confessions to you such as you never made. When the evidence comes to be given at the trial, the witness tells what story he pleases: as for you, you must not open your mouth to contradict him: although, were you admitted, to state what passed, it might be in your power to satisfy the judge, that the account given of the conversation by the witness could not possibly have been true.

If, instead of sending his agent, the plaintiff had gone with him, his testimony, it is true, would have been excluded as well as yours. In words, here is a sort of reciprocity; but in effect, no such thing. The plaintiff has no need to tell his own story: he has his witness, by the supposition a partial, and even corrupt one, to tell it for him. The plaintiff, instead of being a sufferer by the exclusion put upon himself, is a gainer by it: understand, where his plan of defence is dishonest, as it is here supposed to be. In his spontaneous examina-

trate would be in some measure able to judge), or if any sufficient reason rendered him unable or averse to give the necessary explanations without delay, he would be at liberty to say as little or as much as he pleased; but that if, when the trial should come on, and he should come to be finally examined, the explanations afforded by him should appear to be such as might with equal facility and propriety have been given on the spot; his having refrained from giving them at that time, would be considered as strong evidence (though even then, not conclusive evidence) of his guilt.—*Editor.*

tion, he would have had the advantage, it is true, of joining his witness in the concerted lie; but in their cross-examination (being kept out of each other's hearing for that purpose), they might have been brought to contradict one another, and thus the lie might have been discovered.

On this occasion, as on so many others, *mutato nomine* the law departs from its own principles: the same evidence which it refuses to hear at one time, in a cause called by one name, it admits at another time, in a cause called by another name: but the repentance comes too late for justice. In the original cause, the corrupt witness (things being as in the case above supposed) stands up uncontradicted, and carries his point. In another cause, if the injured plaintiff has courage and money to venture upon it,—in a derivative cause, growing out of the original one,—in an indictment brought against the perjured witness for the perjury,—the mouth of the corrupt witness (now converted into a defendant) is stopped, while that of the quondam plaintiff, now called a prosecutor, and under that name a witness in his own cause without difficulty, is opened.\*

Here there are two causes, one after another, in each of which the judge hears but on one side;

\* In the supposition of a prosecution grounded on such evidence, there is nothing at all unnatural. On your single testimony, the jury (suppose) would not convict: but, though nobody but yourself and the perjurer was present, it may happen to your testimony to receive support from circumstantial evidence; or from extrajudicial confessorial evidence of the perjurer's, coming from another witness in the shape of hearsay evidence.

instead of a single cause, in which he might have heard on both sides. Nor even by this second cause,—supposing the truth to come out, and the judge to be satisfied about it,—is it in his power to do justice: for in this second cause nothing more can be done than the convicting the perjured witness of the perjury: to do justice to the party injured by the perjury, there must be a third cause, of the same denomination as the first. And this is what justice gets, by the care taken to defend the wisdom of the judge from deception, and the feelings of the parties from vexation, by a rampart of excluding rules. The man of law is satisfied, because suits are multiplied: but where is the satisfaction to the injured suitor and to justice?

Another circumstance concurs in rendering the remedy still more inadequate. In the prosecution for the perjury, conviction ought not to take place, and naturally will not take place, without the degree of persuasion commensurate to the punishment attached to so high a crime: whereas, in the original non-penal suit, any the slightest degree of preponderant probability would have been sufficient to turn the scale.

On this head, compared with English law, Roman law (with all its faults) distinguishes itself to great advantage. In simplicity, though absolutely imperfect, it is relatively transcendent.

In his own favour,—that is, at his own instance,—it suffers not the testimony of any party, of any person at least whom it recognizes in that character, to be received: and thus far it does wrong.

But in his own disfavour, that is, at the instance of his adversary, (or of the judge, in the case of inquisitorial procedure,) the testimony of the party is in every case received, and allowed to be called for: and thus far it does right.

As to admissibility, there is no such irrelevant and indefinable distinction as that between civil and criminal. The only difference is, that in a case recognized as a criminal case, the testimony of the defendant is called for of course, and in the first instance;—whereas, in a case recognized as a civil (that is, a non-criminal) case,—though the testimony of each party may be called for by the other,—unless called for by the opposite party, it is not called for, or received, by the judge.

It is to English law that we must look for modification upon modification; and that confusion and inconsistency, with the delectable and ever-cherished intricacy, which, where there is but one straight course, is the necessary consequence.

Courts upon courts; each, in this part of the field, proceeding and judging by a different set of rules: as if the suitors were human creatures in some one of them, and beings of a different composition in the other. Harmonious disagreement! all tending to one common end.

Which shall we take for the general rule? For elucidation's sake, let it be the rule of exclusion: the rather, as being consigned to one of those Latin maxims, which, though in universal currency, express with equal infidelity, both what is the practice, and what ought to be. *Nemo debet esse testis in propria causâ.*

Taking this for the general rule, we shall find it cut into by exceptions upon exceptions; and that in each of the two parts into which we have seen it dividing itself.

This, for the rule with regard to the *admission* of the party's testimony, in his *own* behalf. Next, with regard to the *compulsory extraction* of it, in behalf and at the instance of the *other* party, comes another Latin maxim, the absurdity of which has already been fully exposed : *nemo tenetur seipsum accusare*.

## CHAPTER II.

EXAMINATION OF THE COURSE PURSUED IN  
REGARD TO THE PLAINTIFF'S TESTIMONY  
BY ENGLISH LAW.

SECT. I.—*Plaintiff's testimony, in what cases receivable in his own behalf. Inconsistencies of English law in this respect.*

AMONG the inviolable rules of English jurisprudence, one of the most inviolable is this, that no man (understand, at his own instance) is to be a witness in his own cause. Like other inviolables, it is continually violated: let us observe the violations, and the contrivances by which they are reconciled to the rule.

In the first place, in all causes that are called criminal, (and more especially capital ones), the plaintiff is admitted. In cases of this class, supposing deception to take place, the mischief of it is at its maximum. The plaintiff is called *prosecutor*.\*

By this change of name, he is divested of all bias; no less effectually than if it was by a little seal, a broad seal, or a sceptre.†

\* That you may be sure he is not a plaintiff, that title is made over to the king; who has been rendered the fitter for the station, by his being already in possession of that of judge.

† Vide Part II. DECEPTION. Chap. vii. *Restoratives to Competency*.

Oh ! but at any rate the prosecutor has no pecuniary interest; and pecuniary interest is the only sort of interest which, in the opinion of an English lawyer, can produce any bias in the mind.

Indeed, but he has a pecuniary interest; as substantial a one in these criminal cases, as he can have in any civil (*i. e.* non-criminal) case.

In theft, and other cases of criminal depredation, (it would be too much to say precisely which,—a book might be written upon it,) the prosecutor, upon whose testimony the thief is convicted, gets back the stolen goods: and that (by an almost unexampled exertion of summary justice) without the expense of an additional suit.

In forgery, he does or does not, by the same means, make good his damage. But here, if he does, there must be another suit for it.

In assaults, in case of success, money may visit him in either of two shapes. Instead of being fined, (the money going to the green wax, that is, to the king's private purse),—the defendant may be sent "to talk with the prosecutor:" or, being fined, a part of the fine (it must not exceed a third part) may be put openly into the prosecutor's pocket.\*

Upon affidavit evidence, introduced by a motion "for an attachment," or, by a polite circumlocution, "that the defendant may answer the matters of the affidavit;" causes of a pecuniary nature are tried every day in all the

\* Had the suit been of that sort which is called an action (a civil action), his testimony would not have been receivable. For, in a suit of that sort, the plaintiff is called plaintiff, without ceremony.

courts. No sooner is the cause intituled "the King against such a one," (but care must be taken that the title be not put upon it too soon), than the cause becomes a criminal one: and the money, by which the plaintiff would otherwise have been turned into a liar, and the judges deceived, loses all its influence.

One thing is clear enough, to any one at least whose eyes are not closed by science:—viz. that 50*l.* is not made less than 50*l.*, by being given under the name of costs. Therefore,—of whatever nature may be the satisfaction, pecuniary, vindictive, or honorary,\* the prospect of which is the motive that gave birth to the suit; if reimbursement (partial as it is at best) under the name of costs, be among the consequences of success in the suit, the interest of it is of a kind as strictly pecuniary, as it is in the power of money to create.

In actions not comprehended under the denomination of penal ones, the exclusion put upon the evidence of the party (provided always there is but one) is no less, in effect, as well as design, inexorable, than in design it is in penal actions.

In the case we have just been viewing, the extensive case of injuries to person,—the same individual, who suing by a civil action, and called *plaintiff*, would not be heard, suing by an indictment or information, and calling himself *prosecutor*, is admitted without difficulty. But so long as the words employed are *action* and *plaintiff*, the difficulty is insurmountable, the judge inexorable.

\* See Dumont, *Traité de Législation*.

To the admissibility of the prosecutor in the capacity of a witness, there is, however, one remarkable exception. There is a class of offences in regard to which, how noxious soever to the public, (that is to say, to any or every individual), no one individual can be found, who (unless by accident) has any interest capable of engaging him to take upon himself the expense and vexation attached to the function of prosecutor. In all these cases, either a factitious interest must be created, or the offence go unpunished, and society fall to pieces. Accordingly, in cases of this description, as often as, by the prohibition and punishment attached to it by the legislature, an act was created into an offence, rewards were offered to the individual by whose exertions the conditions necessary to the infliction of the punishment should be fulfilled. In the whole, or in part, the punishment was put into a pecuniary shape, and termed a *penalty*: the penalty, in case of success, (or a part of it), constituted the remuneration of this temporary servant of the public. *Costs*, that is, a reimbursement (never more than partial) of expenses of suit, under that name, were added or not added, according as the lawyer by whom the legislator was led, happened, for this purpose, to be faithful or treacherous, awake or asleep.

What, on this occasion as on all others, was the care of the man of law, was, that rules of law should be observed: what, on this occasion as on others, was no part of his care, was, that offences should be prevented. It was decided, therefore, that the testimony of a witness of this sort,—a witness who, in case of conviction,

expected to receive the penalty, or any part of it.—was bad, that is to say, inadmissible. Had the person to whom the reward was offered, been allowed to earn it by giving his testimony, he would have committed perjury: judge and jury would constantly have been deceived by the perjury, and so, instead of the guilty, punishment would have fallen upon the innocent. How so? For this plain reason: because the suit was called civil; and, in a suit denominated civil, the plaintiff is called plaintiff. Whatsoever else the king may get by the suit, what he does not get by it is, the title of plaintiff: which, consequently, finding no other place to rest on, rests upon the shoulders of him by whom the function is performed.

All instances of the exclusion of witnesses on prosecutions for offences created by statute, are acts of usurpation committed by the judicial authority against the legislative. But, in the case of the exclusion of informers, the usurpation is more particularly flagrant—I had almost said *impudent*. The legislature beckons a man into court; the judge shuts the door in his face.

All this while, unless those who know of an offence tell of it, it cannot be punished; and unless those who know of it are paid for telling of it, they will not tell of it: this the legislature is convinced of, and therefore offers money for the telling of it.

The legislature, satisfied that, without a factitious inducement, a man who has not the interest of revenge to prompt him, will not subject himself to the trouble, expense, and odium of bringing to punishment an offender, whose of-

fence, how prejudicial soever to the public, produces no mischief that comes home in the shape of suffering to any particular individual, — orders that a reward to a certain amount shall be given by the judges to him by whom the information requisite for that purpose shall have been given. When the man comes for his reward, the judges refuse to give it him. Why? Is it that it was not the will of the legislature he should have it? No: but because the will of the legislature is contrary to their rules.

Such are the effects, political and moral, of these excluding rules: breach of faith, as towards individuals; breach of obedience, as towards the legislature.

It is among the maxims of men of law, that no man ought to be suffered to be wiser than themselves: but unless many men had been wiser, as well as more honest, than themselves, society would long ago have gone to wreck. The maintenance of society has all along depended upon the evasion of this rule of law. Society exists: therefore the rule has been evaded. The intention of the judges was to defeat the intentions of the legislature: individuals, by defeating the intention of the judges, have rendered to the public that service which it was their object to prevent, and to the legislature that obedience on which the preservation of society depends.

If the man who saw the offence committed has nothing to get by telling of it, he is an unexceptionable witness: but having nothing to get by telling of it, he has no inducement to engage him to tell it; and as telling of it in the character of a testifying witness at a distance

from home, and under a certainty of being baited by lawyers, is attended with both vexation and expense, he has just so much inducement to prevent him from telling it. One of two things: either the man who on these occasions appears in the character of an uninterested witness, and, upon being interrogated, declares himself upon oath to be uninterested, is really an interested one; or he acts without a motive: the effect is produced without a cause.

As often as the effect can be produced without a cause, they are willing (these men of science) that it shall be produced; they are willing (these upright ministers of justice and patterns of constitutional obedience) that the will of their superior, the legislator, shall be done. As often as the effect cannot be produced without a cause, their determination is, that it shall not be produced, and that the will of the legislator shall remain undone: that the law, which they are sworn to execute, shall remain unexecuted.

But they have a reason for what they do; and it is this:—to gain twenty pounds, a man will speak the truth; by coming and speaking the truth, he will lend his exertions to give execution to the laws:—therefore, for the same price, he will be ready to commit perjury. Yonder man cut the throat of a pig, the other day, for sixpence; therefore he would cut the throat of his brother for the same price. Such is the logic of these lawyers.

That by this logic and this wisdom, perjury was ever prevented in any one instance, seems not in the smallest degree probable: that by

the same exertions it has in many instances been produced, seems in the highest degree probable.

By what contrivance the existence of the interest can be denied in words, in such manner as to save the witness from the danger of legal conviction,—what expedient is in these cases most usually relied on, and upon occasion employed,—I do not undertake (for it is not necessary) to know. As promising a one as any, appears to be this: in the present cause, in which I am plaintiff, you give me your testimony *gratis*; in the next cause you will be plaintiff, and then it will fall to my share to return the accommodation.

Another arrangement may be this. The only man who knows of the transgression is forbid to tell of it. True: but the prohibition does not extend to those who know nothing about the matter. Well then: when a man who means to earn the reward, comes to me (A. B. an attorney) to know how he is to get it, this is the way in which we will settle it between us. Though he must not tell the judge in the first instance; though he must not put in for the reward, (since if he did, the judges would not let him give the evidence which he must give to earn it); this will be no hindrance to me, who have no evidence to give. Let him, then, tell me the story: and I, or (what will do as well) John Doe, will put the story into grim-gribber, to make it intelligible to the judge. When the trial comes on, the witness tells the story; when execution comes, I pocket the reward. The witness cannot receive a penny of it: but I am a man of honour, and too generous to suffer a good witness to be a suf-

ferer by the time he has expended in the public service.

Is interest in reality cleared away by this manoeuvre? Are effects produced without causes, as the sages of the bench intended they should be produced? Is the self-purgative oath, which must be swallowed upon occasion by the witness, nothing worse than an equivocation, pure from the taint of perjury? This will depend upon the skill and attention of the preceptor, and the capabilities of the pupil.

In the first instance, the laws turned into a dead letter by the precipitancy of a judicial rule; in the next place, something (to say the least) nearly approaching to perjury, the constant result of their connivance at the evasions put upon their own rules! Which is the worst? the disorder, or the remedy?

As the rule which admits the evidence of the plaintiff when called a prosecutor, is not without exceptions, so neither is the rule which excludes the evidence of the plaintiff when called a plaintiff. One exception, a very colossus of inconsistency, stares us in the face, and figures in all the books. A statute had been made, entitling a traveller to receive compensation at the expense of the hundred, in case of his being robbed between sun and sun. A decision was pronounced, by which in this one instance the inviolable rule was violated, and the party (the plaintiff in an action on this ground) was admitted to support his demand upon the district by his own evidence. The word given by way of reason was *necessity*:—unless this evidence be admitted, the law will fail of its effect.

It is difficult to see on what ground to rest the passing of this statute. Was it to excite the hundreders to vigilance? Was it to dissipate the loss, by breaking it down into impalpable portions, upon the principle of insurances? The first conception is altogether visionary, and the second is in repugnancy to it. Be this as it may, obedience to the legislator is always laudable, and especially on the part of a judge. But, for beginning the practice of admitting the plaintiff's evidence, it seems difficult to imagine a case in which the demand for the exertion could have been less, or the danger more formidable. Even without any view to protection, more journeys are taken in company than in solitude. In this case it would have been easier than in a thousand others that might be mentioned, for a man to provide himself with preappointed evidence. To carry a witness with him might be attended with expense; to shew to a friend the contents of his purse at starting would involve no expense.

One circumstance fills up the measure of absurdity. Conceive the whole number of rateable inhabitants in the hundred escorting the traveller the whole time he employed in traversing it. The traveller swears he was robbed: the hundreders swear he was not, for they were with him all the time. The one really interested witness would command the verdict: the five hundred nominally interested, but really not interested witnesses, would not be suffered to open their mouths.\*

\* In speaking of *hundreders*, dreading inaccuracy, I took

Absurd as the admission is in a relative, I mean not to hold it up as such in an absolute point of view. Under favour of such encouragement, here and there a case has probably happened in which a fraudulent demand has been made on this ground, not impossibly a successful one. But, from the station which such a law, supported by such a decision, still maintains in the statute book, a pregnant proof is surely afforded (were all others wanting) how little the interests of truth and justice would have to apprehend from the unreserved admission of the party's testimony in his own favour in any imaginable case.

Equity presents a different scene: for the same mode of searching after the truth is good or bad, according as, in speaking of it, you pronounce the words *common law* or *equity*.

care to limit the import of the term by the adjunct *rateable*. The caution was superfluous.

Anno 1713. In the King's Bench. Parker, chief justice. "No one living in a hundred shall be allowed to give evidence for any matter in favour of that hundred, though so poor as upon that account to be excused from the payment of taxes: because, though poor at present, he may become rich."—(The Queen against the Inhabitants of Hornsey, 10 Mod. 150.) This judge, whose sensibility to the idea of pecuniary interest was thus exquisite, was afterwards chancellor, with the title of Earl of Macclesfield.

On this footing continued the law till the year 1735; (8 Geo. II. c. 16. sect. 15. See also 22 Geo. II. c. 24; and 22 Geo. II. c. 46.); when a statute was made to alter it. Recognizing for law the admission given to the testimony of the plaintiff supposed to have been robbed, (though doctrines much better supported were then, and are still, over-ruled every day), it gives admission to the testimony of hundreders, but confines it to this single case. On all other occasions, hundreders, that is, all the good people of England without exception, continue as certainly liars and deceivers as before.

Ask an equity lawyer, ask any lawyer; he will tell you without difficulty, and without exception, that in equity the testimony of the plaintiff never is admitted: no, not in any case whatever. Thus much certainly is true, that it never is admitted to any good purpose: but thus much is no less true, that it is admitted to every bad purpose.

Here, on this occasion, the arrangement we set out with is unavoidably departed from. Striving, in behalf of existing establishments, to find, as far as possible, for every thing an honest reason, a reason referable to the ends of justice,—I set out with taking the fear of producing deception, and the fear of producing vexation, as the causes of the existing arrangements. But here, both principles of arrangement fail us altogether. The phenomena, as we see and feel them, will be effects without a cause, if any thing but the pursuit of the spurious ends of judicature, the ends really pursued in the formation of the technical system, the professional interests, had been in view and aimed at.

In the first place, to consider the testimony of the plaintiff as proffered by himself.

For the purpose of the ultimate decision, for the purpose of giving termination to the suit, it is not admitted. Why? Lest, peradventure, the suit should be brought to an untimely end. But, for the purpose of giving commencement to the suit, the testimony of this same party is admitted. And here, lest groundless demands should be excluded, and *malá fide* suits prevented, by the fear of punishment as for perjury, that punishment is taken off; and the men-

dacity-license, which we have seen constituting the basis of the technical system of procedure in the common law branch of it, is extended to this pretended purer branch, the equity branch.

In the instruments by which suits are commenced in the way of common law, the mendacity could be, and accordingly was, cloaked to a certain degree by the generality of the terms. To the equity branch, this cloak could not be extended: for neither the grounds of demand, nor the services demanded at the hands of the judge, having been put into any sort of method, (not even that wretched method into which the matter of common law has been shaken by the fortuitous concourse of atoms), a particular story required in every instance to be told.

A court of equity being a shop, at which, for the accommodation of those for whose purposes the delays sold by the common law courts are not yet sufficient, ulterior delays are sold to every man who is content to pay the price; suits are every day instituted in the equity courts, by men who themselves are as perfectly conscious of being in the wrong as it is possible for man to be. A man who owes a sum of money which it is not agreeable to him to pay, fights the battle as long as he can on the ground of common law, and when he has no more ground to stand upon, he applies to a court of equity to stop the proceedings in the common law court, and the equity court stops them of course. Among the uses, therefore, of a court of equity, one is, to prevent justice from being done by a court of common law.

There are many men who, though they have

no objection to reap the profit of falsehood, would not be content to bear the shame of it, notwithstanding the suspension put upon all punishment, legal punishment, by the mendacity-license above mentioned. The fear of shame would be apt to stare a man in the face, if, after reading a story composed more or less of facts which he knew to be false, it were necessary for him to adopt them, and make himself known for a liar by his signature. Accordingly, care has been taken that no such unpleasant obligation shall be imposed. The story is settled between two of his professional assistants, his attorney (in equity language, his solicitor), and his counsel: as for the complainant himself (for so in equity the plaintiff is called), the orator (for so in the same language he is made to call himself), what is probable is that he does not, what is certain is that he need not, ever set eyes on the story thus told under his name.

Such as the seed is, such will the harvest be. Even when the plaintiff is in the right, his *bill* (such is the name given to his story) is a great part of it, to the knowledge of every body, a tissue of falsehoods. The great judge, who knows better than to administer equity unless a composition of this complexion has in regular form been delivered in at the proper office, knows it so to be. It is accordingly a settled maxim with him, that no credit is to be given to any thing that is put into a bill. Falsehood, in equity as well as common law, — falsehood (every equity draughtsman is ready to tell you) is necessary to justice. Accordingly, if through delicacy (which never happens), or from some

other cause (which frequently happens), the attorney and the counsel between them fail of inserting the requisite quantum of falsehoods, no equity is to be had till the deficiency has been supplied. To assert, in positive terms, a fact concerning which a man is in a state of ignorance, is to assert a falsehood; and if there be such a thing as a lie, it is a lie. A lie of this sort a court of equity exacts from every plaintiff, as a condition precedent to his learning from the pen of the defendant what it happens to be necessary for him to know.

Thus then stands the practice, with regard to the admission of the plaintiff's testimony, considered as delivered at his own instance. For the purpose of justice, it is not admitted: to the effect of vexation and expense, and for the purpose of the profit extracted out of the expense, it is admitted,—admitted and exacted. Nor need he entertain the smallest hope for justice, unless, to swell the account of profitable expense, this testimony (such as it is) is stuffed with falsehoods.

The real purpose of equity procedure will be seen standing in a still more conspicuous point of view, when we come to consider how far, under the rules of the same courts, admission is given to the testimony of the plaintiff, when called for at the instance, and consequently with a view to the advantage, of the defendant.

SECT. II.—*Plaintiff's testimony, in what cases compellable at the instance of the defendant. Inconsistencies of English law in this respect.*

THE plaintiff, is he compellable to testify

against himself?—to testify at the instance of the defendant?

Under this remaining head, as under the former, let us observe, in the first place, how the matter stands at common law.

In cases called criminal cases, at the trial, the plaintiff (we have seen) is, under the name of *prosecutor*, always a witness at his own instance, and consequently for himself; frequently the sole witness. When in this way he has been testifying for himself, the defendant, in virtue of the right of cross-examination, possesses the faculty of causing him to testify against himself. That the plaintiff should be called upon to testify by the defendant in the first instance, is what can never happen, at least never does happen. Expecting the plaintiff, the prosecutor, to come forward, and testify of course *pro interesse suo*,\* it can scarcely occur to the defendant, (that is, to the professional assistants of the defendant,) to call for his attendance in the defendant's name.

In those criminal cases in which, as above, there is but one inquiry, and that inquiry carried on (if the contradiction may be allowed) by uninterrogated evidence, neither party saying any more than he thinks fit;—the plaintiff, in particular, is not compellable to say any thing at the defendant's instance. Here again, however, to place the case in a correct point of view, the distinction between compulsion *ab extrâ* and compulsion *ab intrâ* must be called

\* A phrase employed on a particular occasion in equity law.

in. The prosecutor is not, any more than the defendant, compellable at the instance of the adversary, by the fear of any collateral punishment, like an extraneous witness; the prosecutor, as well as the defendant, is impelled by the interest he has at stake in the cause, to say every thing that he can say with safety in support of the interest he has in the cause. So far then as the defendant, in his affidavit, says any thing that can operate to his own exculpation, this defence is a sort of call (though an indirect call) upon the prosecutor, to bring forward any further facts (if he has any which he can advance with safety) that promise to operate in refutation of such defence.

The facts thus brought forward in reply, at whose instance are they brought forward? At the defendant's, if at any body's. But in whose favour do they operate? As certainly, in the prosecutor's, and his only. Are there any, that, if brought forward, would operate to the advantage of the defendant, to the disadvantage of himself? So surely as he knows of any such, so surely does he keep them all to himself. So far from being called upon for them by particular interrogation, he is not so much as called upon for them by the general terms of his oath. Before a jury, the deponent being an extraneous witness, the oath says, "the evidence you are about to give shall be the whole truth," as well as "nothing but the truth." "The contents of this your affidavit are true," says the person by whom the oath is administered to a deponent on the occasion when he is said to make affidavit. Correctness is stipulated for, how ill soever secured: com-

pleteness, absence of partial imperfection, is not so much as stipulated for.

Such is the form, the only form, in which the judges (I speak of that class of which learning is the exclusive attribute) will suffer testimony to be delivered to them, when the decision grounded on it is to be framed by themselves.

In the case of those accessory, and most commonly redundant, inquiries, which, in indictments and informations, precede or follow that principal one which is called the *trial*; the testimony, being likewise in the form of affidavit evidence, falls, in like manner, under the last preceding observations. So likewise in the case of those comparatively summary causes, in which (though ranked under the head of civil causes) the suit,—instead of commencing by a declaration delivered in at an office, and never looked at by the judge,—commences by a *motion*, *i. e.* by a speech made to the judge, in open court, by an advocate.

In the case of the examinations by which, in felonious and peace-breaking offences, the trial is preceded, (inquiries performed by a justice of the peace,) the obligation of the prosecutor to testify at the instance of the defendant, and thence to the disadvantage of his own cause, stands on the same footing as at the trial, as above.

In a nearly similar, though not exactly the same, predicament, stands the *ex-parte* inquiry, which, in all suits prosecuted by indictment, is carried on in secret before the grand jury, antecedently to the trial. No defendant being

there, nor any person on his behalf, the plaintiff cannot be compelled to testify at the defendant's instance. But at the instance of any one of those his judges, the prosecutor—while occupied in delivering his testimony at his own instance, and consequently to the advantage of his side of the cause,—may, and frequently does, by questions put to him by any of those judges, find himself under the obligation of disclosing what may operate to the disadvantage of it. Such counter-interrogation has the effect of cross-examination, in so far as the zeal and probity of the judge alone may be considered as an adequate succedaneum to that same zeal and probity added to the interested zeal of the party (the defendant) whose safety is at stake.

Let us next suppose the case civil; and the procedure still at common law, viz. by action.

Principal or sole inquiry,\* the trial.

On this occasion, unless the plaintiff, by any of the expedients above spoken of, has contrived to deliver his own testimony in his own favour, the defendant cannot, by the single powers of common law, draw upon that same source for any testimony which he on his part may stand in need of.

But if the plaintiff has contrived, in any such way, to give himself the benefit of his own testimony, the defendant, in virtue of the right of cross-examination, may also put in for his share.

In general, therefore, at common law, the defendant has no means of obtaining the benefit

\* Sole inquiry, if the pleadings are not reckoned : principal inquiry, if they are.

of the plaintiff's testimony : in no case without the consent of his adversary ; nor then, but at the adversary's own instance, and by the adversary's own contrivance : that is, in no case but where, in all probability, (and at any rate in the opinion of his adversary, the plaintiff,) it will be of no use to him.

I said, by the single powers of common law. The limitative clause was necessary. For in certain cases (though nobody knows exactly what cases), by the assistance of a court of equity, the testimony of either of two persons about to appear in the characters of plaintiff and defendant at common law, may be extracted at the instance and for the benefit of the other. To the extent therefore of the aggregate, whatever it be, of these cases, (concerning which, *quare, quære, et in æternum quære*), the objection to the admission, the forced admission, of the plaintiff's testimony, has for its psychological cause — not the fear of deception, not the fear of producing vexation, (*viz.* excessive and preponderant vexation), but, if vexation must be mentioned, the fear of not producing enough of it.

But, as the draft drawn upon the breast of the adversary for evidence is more apt, much more apt, to be drawn by that of one of the two parties who institutes the suit, than by the other, who is dragged into it ; the consideration of this mode of making holes in the door shut against the light of evidence, will be considered to more advantage, when the defendant's side of the cause comes under review.

Thus much for common law : we come now to equity law.

The testimony of the plaintiff, is it allowed, in these courts, to be delivered at the instance, and thence for the benefit, of the defendant? Not it indeed. But why not? Because, if it was, the man of law, in all his forms, would lose the benefit of a second cause. The delay, vexation, and expense of a suit at common law, is not enough for him: the delay, vexation, and expense of an equity suit, coming upon the back of a common law suit, is not enough for him: there must be a second equity suit,—or (so it will be in many instances) the facts in the case will be but half brought out,—will have been brought out only on one side.

There must be what is called a *cross* cause, commenced by a cross bill, in which the plaintiff and defendant change sides: and the same individual, on whose testimony not a single fact was deemed fit to be believed, is now believed; and believed to such a degree, that the testimony of a disinterested witness, by whom his testimony should be contradicted, would tell as nothing: the judge would not so much as stay to inquire which of the two testimonies, the interested or the disinterested, seemed most deserving of credit, but would ground his decree upon the interested testimony, just as if the disinterested had never been received.

In this particular, so far as extortion and denial of justice are improvements, the English edition of the Roman system of procedure is no small improvement on the continental edition: to judge of it at least by the practice in French law. In French law, in the course of one and the same suit, though neither party is supposed

to deliver his testimony at his own instance, each party obtains the testimony of the other.

The old French law, with all its plagues, the French modification of the technical system, enclosed no such curse as that of two sets of courts, each operating with powers kept imperfect, that assistance and obstruction may be obtained from the interposition of the other. The inquiry which in the English system occupies three suits, — one common law, and two equity suits, — was in the French system dispatched in one.

Even under the English edition of the Roman system, in that division which, in virtue of a connexion already become obsolete, goes still by the whimsical name of *ecclesiastical* law, more honesty or more shame has been preserved, than thus to make two grievances out of one. In the courts called ecclesiastical, as in French law in all the courts, in the course of one and the same cause (I speak of causes non-penal) each party obtains the testimony of the other.

## CHAPTER III.

EXAMINATION OF THE COURSE PURSUED IN  
REGARD TO THE DEFENDANT'S TESTIMONY  
BY ENGLISH LAW.

SECT. I.—*Defendant's testimony, in what cases receivable in his own behalf. Inconsistencies of English law in this respect.*

WE come next to speak of the case where (the suit, as before, not affecting more than one party on each side) the party whose testimony is in question is the defendant.

Is the testimony of the defendant admitted at his own instance?

Here, as before, the answer will be different according to the species of the suit: *i. e.* whether it be criminal or civil; and if civil, whether the theatre be a court of common law, a court of equity, or an ecclesiastical court: and (whatever be the suit) according to the stage of the cause, *i. e.* which inquiry it is, of the several inquiries which the species of suit admits of, where it admits of more than one.

I. Case, criminal: procedure at common law.

1. In this case, as in that of the plaintiff, in the first place let the cause be a criminal one;

mode of procedure by indictment ; inquiry, the principal one, the trial.

At his own instance, at the trial, is a defendant allowed to deliver his own testimony at his own instance, and consequently in his own favour, to his own advantage? No, and yes : no, in words ; yes, in effect.

In words, no : for in that station, let a man say what he will, it is not *evidence*. No oath can be administered to him ; lest, if that security for veracity were applied, it might have the effect of confining his statements, his *non-evidentiary* statements, within the pale of truth ; which “ would be inconvenient.” Not so much as a question can be put to him by any body. Not by his own advocate, if he be rich enough to have one ; not by the advocate on the side of the prosecution ; not even by the judge. By being circumstantiated, distinct, complete, and methodical, his statement, if true, might be seen to be so ; if false, or incomplete, might be made to appear so : which again, according to established legal notions of inconvenience, would be inconvenient.

In effect, yes ; for, so long as it is not called evidence, — nor subjected to any of those processes by which evidence is purged (or endeavoured to be purged) of its deceptitious qualities, — he may say whatever he chooses to say, under the name of his *defence*.

As to the judges *ad hoc*, the jury, — with the uniform degree of suspicion naturally called forth by the view of the situation in which they see him placed, added to the variable degree of suspicion called forth by the evidence that has

been delivered on the other side, they form their judgment of the trustworthiness of this non-evidentiary statement: taking into account, at the same time, its consistency or inconsistency with itself, and with such relevant facts as are of themselves sufficiently notorious without evidence. What they do think about, in judging of this statement, is, its trustworthiness or persuasive force, intrinsic and extrinsic, as above: what they do not think about, in judging of it, is, the kiss that has not been given to the book: for as to any security that may be supposed to be given by any such kiss, for the truth of the assertion, or the performance of the engagement supposed to be sanctioned by it, it cannot be a secret to any one of them, who, to get out of the box so much the sooner, has joined in a verdict of *not guilty*, in favour of a defendant of whose guilt he was at that time persuaded in his own mind.

No counter-interrogation. Will the absence of this security for correctness and completeness present itself to a jurymen as a reason for paying no regard to what he hears? Yes; when their learned directors cease to receive affidavit evidence, uninterrogated evidence, to the exclusion of interrogated evidence.

In offences of the rank of felony, the case is comparatively so rare, in which a man in that unhappy situation has any thing plausible to say for himself (especially in the character of testimony), that, comparatively speaking, the operation of this non-evidentiary sort of testimony seldom presents itself to view.

2. Case criminal, as before.

Is the mode of procedure by information?

The chance which a defendant has of profiting in this way by his own testimony, will not be essentially different. But, his situation not being in this case so apt to attract the compassion of the public as in the other; the quantity of suffering to which he stands exposed, not being so great, as in those cases which occupy the largest space in the list of indictments; the defectiveness of his claim to have his non-evidentiary statement received on the footing of evidence, will not be so apt to pass without remark.

Moreover, among indictments, a considerable number will always be *pauper* causes. Nineteenth, at least, of the cases which come on in the way of indictment, are cases of depredation; and these have, almost all of them, either by statute, or by jurisprudential law, been promoted to the rank of felonies. By *pauper* causes, I mean here such wherein the defendant is not rich enough to engage an advocate. Having no one to speak for him, on the part of a jury there will naturally be the more readiness to hear a poor culprit speak for himself.

Besides, in felonies, the tongue of the defendant's advocate (when there is one) is but half let loose. Questions,—interrogations and counter-interrogations, for the extraction of testimony,—he is allowed to put. Statements, or observations on the evidence, it is not allowed to him to make.

Indictments, especially in cases of felony (by far the most numerous class of indictable cases), are, therefore, many of them, *pauper* causes. But informations are none of them *pauper* causes: a principal recommendation of

this mode of prosecution, as compared with indictment, being the property it possesses of loading the parties with an extra mass of expense,—the enormity of which has no connexion with the merits,—which, being never held up to view in the sentence, is of no use in the way of example, and has no other effect than that of impoverishing the suitor, and enriching the man of law.

3. Case criminal, as before: mode of procedure, by attachment: principal or sole inquiry, (if inquiry it may be called, where there are no questions), by receipt of affidavit evidence. Here all discrimination, all subterfuge, is at an end. So long as he is not checked by any such inconvenient curb as that of counter-interrogation, and on condition of his taking the pen of an attorney to speak through, instead of his own lips, (or rather on condition of his setting his hand to sign what the attorney has said of him and instead of him—for in affidavit evidence the deponent never speaks for himself,) let his designation be what it may, extraneous witness or party, plaintiff or defendant, his testimony is received with equal deference. Interested or not interested, perjured or unperjured,—thus introduced, all doors and all ears are open to the testifier.

When an exclusion is put upon testimony, the objection is, nominally and ostensibly to the station of the proposed deponent, really and at bottom to the shape in which the testimony is presented. Give but this shape to the testimony,—a shape to the purposes of justice the most unsuitable, to their own purposes the most profitable,—learned gentlemen on this

occasion pay no more regard to their own rules, their own most sacred and fundamental rules, than on this and all occasions they pay (unless it be for the purpose of contravention) to the ends of justice.

4. These same observations apply of course, and with equal force, to all that multitudinous and most extensive list of cases, in which, to the exclusion of all better evidence, testimony is received in this unquestioned and thence most questionable shape.\* 1. *In re criminali*,—on indictments, on occasion of the supplemental inquiry; on informations, on the preliminary as well as on the supplemental inquiry. 2. *In civili*,—at common law and equity law, in all motion causes, on the sole inquiry. 3. In the sort of motion causes called *petitions*,—causes relative to the estates of bankrupts, and heard by the highest equity judge, in a mode that by its summariness forms the most striking contrast to the regular equity mode; on the inquiry which, in that unusually important class of cases also, is the only one. 4. On the occasion of all those incidental applications, which (be the cause where it may, and what it may) are received in the course of the cause; and for which the occasion has been manufactured in such abundance, and with such successful industry.

5. Procedure, by indictment, as before; inquiry, the preliminary one, the examination, as it is called, before the sort of judge called a justice of the peace, acting singly.

\* “Thou com'st in such a questionable shape,  
That I'll not speak to thee:”

a parody such as Hamlet could little have expected from the bench of justice.

On this occasion,—there being, or not being as yet, a person, established (under the name of prosecutor) in the station and function of plaintiff,—the testimony of the defendant, in relation to himself, is called for by the judge. Called for from that commanding station,—the occasion and the station of the respondent being more or less perilous,—for the most part, if he be guilty, (as in most instances he is), it comes from him with reluctance: but, while what he thus wishes to withhold is extracted from him against his wishes,—whatever his wishes prompt him to deliver at the same time, pours itself out of course at the same gate. What he thus advances on his own behalf, is it, or is it not, evidence? Once more, yes and no. Yes, to the purpose of the question, whether he shall be subjected or no to ulterior prosecution, and for that purpose consigned to imprisonment for safe custody. No, to the purpose of the question 'guilty or not guilty;' the question to be decided at the trial. Yes, in the first case, in effect: no, in both cases, in words.

6. Procedure, by indictment, as before: inquiry, the preliminary one, before the grand jury.

On the occasion of this partial and secret inquiry, the presence of the defendant being neither compelled nor admitted; his testimony, as well at his own instance, as at the instance of his adversary or the judge, is out of the question.

## II. Civil cases, at common law.

Case, a civil one; procedure, in the way of action: inquiry, the principal one, the trial: (the only one, except the sham inquiry composed of the *pleadings*—the inquiry carried on

by lawyers on both sides, for the benefit of themselves and their superiors and protectors, by reciprocal effusions of falsehood, of vague assertion, and nonsense, poured out under the mendacity-license, without the signature, and, as to details, without so much as the privity, of the suitors who are made to pay for it).

On the occasion of the trial, occasion has been taken to delineate the plaintiff, appearing in disguise, in causes of this class, in the character of an extraneous witness: admitted, in that character, in spite of technical rules and principles, to employ his own testimony in the support of his own claims.

In this advantage the defendant has no means of sharing. At the trial, he is not shut out, because nobody is shut out. But at the trial, speak he must not: not in his own character; nor is there a crevice through which he can creep in, to speak in any assumed one.

Speak indeed he may; if mere speaking will content him, without speaking to any purpose. For, in cases of this class, defendant and plaintiff standing on even ground, and without any nook for compassion (real or hypocritical) to plant itself upon, and cry, Hear him! hear him! whatever he may (if he have courage) insist upon saying, will be watched by men with sieves in their hands; and whatever testimony he may take upon him to throw in along with his matter of argument and observations, will be carefully separated, and forbidden to be lodged in the budget of evidence.\*

\* There is one case, according to Phillipps, in which the evidence of the defendant is allowed to be given in his own behalf, on the occasion of an action in the common law

One case there is, which for its oddity, as well as its inconsistency and absurdity, is worth observing.

This is the case of a mandamus.\* Like an attachment, a mandamus is a writ, of a special nature. Like an attachment, this writ is not to be had without asking for in open court:

courts. The case I allude to, is that of an action for a malicious prosecution, "where it seems," says Phillipps, "to have been understood, that the evidence which the defendant himself gave on the trial of the indictment, may, under certain circumstances, be received in his favour on the trial of the action." Phillipps, i. 66.

Observe that in this, as in so many other cases, evidence which might without any trouble be obtained in a good shape, is carefully put into a bad one. What the defendant said on the first occasion, may be received in his favour on the second; though by what evidence, except hearsay evidence, he can be proved to have said it (unless the judge's notes happen to have been preserved) is not clear: while the defendant himself, who is there in court, ready to be examined, and without the slightest inconvenience in the shape of delay, vexation, or expense, stands peremptorily debarred from opening his mouth.

Whether he is allowed in this case to give evidence for himself, or no,—certain however it is, that in this one case his wife is allowed to give evidence for him, which, in the opinion of Phillipps, seems to be the same thing. The reason given by Lord Holt for admitting in evidence the oath of the defendant's wife, to prove the felony committed, is as follows: "For otherwise, one that should be robbed would be under an intolerable mischief: if he prosecuted for such robbery, and the party should be acquitted, the prosecutor would be liable to an action for a malicious prosecution, without the possibility of making a good defence, though the cause of prosecution were ever so pregnant." The reason is a good one; but admit its goodness, and what becomes of the exclusionary rule?—*Editor*.

\* Is this a regular cause? an action? or is it not rather a sort of motion cause? By lawyers it is confounded with actions. But in the track of procedure, its march is that of a motion cause.

and it is by affidavit evidence, that, on this as on all other occasions, the application is supported and opposed. In the case of the attachment, the writ is directed to the sheriff, and commands him to seize the body of the defendant, and do with it, he knows how: in the case of the mandamus, it is addressed to the party, the defendant.

But the curious circumstance, and that which brings it under the present head, is this. When once the writ is issued, not only the testimony of the defendant is admitted, but no other evidence is admitted: when admitted, it is admitted not only without the check of counter-interrogation, but without so much as the sanction of an oath: and in this shape, still less trustworthy than even that of affidavit evidence, it is not only admitted, but made conclusive.\*

\* In one case, one sort of case,—viz. that where the object of the mandamus is to procure the filling up of a vacant office in a "borough or corporation," or the due filling of it up, where unduly filled,—provision has been made by a statute of Queen Anne (9 Anne, c. 20), for putting this sort of procedure upon a footing analogous to that of an ordinary action. But in all the other sorts of cases, the remedy remains still in the state in which that statute found it.

In one case,—one individual case,—the return received somehow or other (it does not appear how), the sanction of an oath; but this case was out of the common course: a special order was made for the purpose. (3 Car. I., B. R. Anno 1630. Palmer, 455.) Lawyers, like other men, are subject to fits of forgetfulness; in those fits, that love of justice which, having been planted by nature in every human bosom, can never be completely eradicated in any, not even in that of a technical lawyer, breaks out into irregularities. But,—howsoever it may be with this or that individual, on this or that particular occasion,—professions, taken in the aggregate, are ever steady to the professional interest: so that, after the general rule, which owed its birth to the general

### III. Civil cases, in equity law.

In equity procedure, the case of a defendant proffering his own testimony without its having been called for on the part of the plaintiff, can never happen: a suit in equity never commencing in any other way than by an instrument called a bill, in which the plaintiff calls for the defendant's testimony.

After so much as has been said, it surely cannot require in this place any fresh argument to prove, that no real service can be done to the interests of truth and justice, by taking, or attempting to take, each man's testimony by halves; cutting out of it whatever part of the facts happen to operate to his advantage, retaining such only as are supposed, on the other

interest of the profession, has been broken through by the momentary and casual prevalence of individual virtue, or interest or caprice, the predominant force soon brings back the course of practice into its natural channel. Here, on a particular occasion, we see the mendacity-license (one of the most efficient instruments of the technical system) unwarily revoked: on another occasion, we shall see the regular practice,—by which judges forbid the presenting testimony to them, when for their own use, in any other than one or other of two bad shapes, *affidavit* evidence (*i. e.* uninterrogated evidence), or *equity deposition* evidence (*i. e.* secretly and inadequately interrogated evidence),—hastily broken through, and the deponent convened before them and examined by them *vivâ voce*, just as if, on that particular occasion, a fancy took them for coming at the truth. But these rare instances, numerous enough to prove the power of doing right, serve, by their rarity, to shew the want of inclination to employ it.

In the case in question, fortunately for justice, unfortunately for lawyers, the oath was effectual. Not staunch enough to expose himself to the pains of perjury, the *malâ fide* defendant, the mayor to whom the mandamus was directed, restored the plaintiff to the office from which he had been removed: the benefit of the action on the case, for false return, was thus lost to the men of law.

side, to operate to his disadvantage. But, for the purpose of illustration, the consequences of the attempt as conducted, may not be undeserving of notice. Though neither party is permitted, at his own instance, to bring to light, among the facts that have come to his knowledge, such as appear to him to operate in his own favour; each party has, in a greater or less degree, the opportunity of bringing to view those same facts, in the event, and through the means, of the interrogation which may be administered to him by the other. But on what depends the defendant's chance of bringing to light the whole or any part of such of the facts that come to his knowledge, as appear to him to operate in his own favour? Not upon the merits of his cause; not upon the truth or importance of these same facts; but, in the first place, and in some degree, upon the dexterity of his professional assistant in coupling the facts of the one description with those of the other; in the next place, absolutely and conclusively upon the pleasure, upon the accidental circumstances and exigencies of the situation, of his adversary the plaintiff, coupled with the sagacity and judgment displayed by the professional assistants on that side, in their endeavours to turn to the advantage of their client the views of the law. Of the facts brought to view by the defendant, let those which operate in his favour be ever so true and ever so important, not one of them will the judge ever hear of, if such of the facts as operate to his prejudice are testified by such other evidence as, in the judgment of the advisers of the plaintiff, are sufficiently conclu-

sive : so that, as to all facts derivable from that source, the chance which they have of operating with such weight as is their due upon the mind of the judge, depends not either upon their truth or their importance; but upon the will and pleasure of a party, who, the juster the claim is to admission, is so much the more strongly engaged by interest to refuse it.

SECT. II. — *Defendant's testimony, in what cases compellable at the instance of the plaintiff. Inconsistencies of English law in this respect.*

THE testimony of the defendant, is it compelled at the instance of the plaintiff?\*

I. Case, criminal: procedure, at common law.

1 and 2. Case, criminal: procedure, by indictment or information: inquiry, the principal one, the trial.

On this occasion, no compulsion, direct or indirect: not so much as a question permitted to be asked. The defendant, as already stated, says what he pleases in his own behalf; tells consequently (as often as, being guilty, he says any thing in the way of testimony,) a false and imperfect story: not a question is to be put that can tend to the correction or completion of it.

Our business here is with the fact: the actual state of the law. With reference to the ends of justice, what the consequence is, has been already brought to view: to the guilty, nothing

\* Those criminal cases included, in which the judge unites in his own office that of plaintiff, i. e. prosecutor

but impunity and triumph; to the innocent, nothing but danger and inconvenience.

It is not that no testimony is to be received from this same source; on the contrary, any testimony is received, that either has come from it, or (though untruly) has been said to come from it. Any testimony, so the purport or pretended purport of it be but delivered through the medium of another pair of lips—delivered in the shape of hearsay evidence,—is received: unsworn, uninterrogated: if inaccurate, uncorrected; if imperfect, uncompleted.

Here, then, comes the often-presented question, followed by the as often-retained answer. The testimony of the defendant, at a criminal trial, is it compellable? No, and yes: no, in the most trustworthy shape; yes, in an egregiously untrustworthy one. Blessed tenderness! Encouragement to the guilty, injury to the innocent, resolving itself into a predilection for bad evidence.

3. Inquiries of all sorts (sole,<sup>r</sup> principal, supplemental, preliminary, *in criminali*, *in civili*, on the principal point, on incidental points) performed by the receipt of affidavit evidence.

In regard to admissibility, at the will of the defendant, and consequently in his favour, how the matter stands has been seen already. But,—when coupled with the consequences that have been made to follow upon silence,—admission, permission, is compulsion. Every assertion contained in the affidavit of the plaintiff, or of any extraneous witness testifying in this way in his behalf,—every such assertion, so it be not irrelevant, is in effect a question, though a leading, a suggestive one. Deny the fact, or

you will be considered as affirming it, as confessing it.

But the mass of assertions contained in the plaintiff's affidavit, though a sort of succedaneum to a string of interrogatories, is a constantly imperfect and inadequate one: the interrogatories, if such they may be termed, delivered *uno flatu*, not arising out of the answers: the silent virtual confession returned to some of the questions, smothered by the responses (satisfactory or evasive, distinct or indistinct) given to others.

To display in detail the imperfections inherent in the nature of affidavit evidence, belongs not to this place: it has been done in a former Book.\*

Thus much may suffice to warrant the introduction of the already-presented question, followed by the ambiguous answer which there is such frequent occasion to subjoin to it.

On the inquiries (criminal and civil), in which the evidence is cast into the shape of affidavit evidence, is the testimony of the defendant compellable? Yes, and no: not compelled in any good shape; compelled in this egregiously bad one. Tenderness or no tenderness, at any rate a predilection for, a preference (and that an exclusive one) to, bad evidence.

4. Procedure, by indictment: inquiry, the preliminary one, the examination before a justice of the peace, as above.

On this occasion, too, the defendant, in respect of the delivery of his testimony, lies under a sort of compulsion: and that more

\* Book III., EXTRACTION. Ch. 13. *Uninterrogated Testimony*.

efficient than we have seen it in the case of ready-written testimony. To produce the compulsion, no extraneous force is indeed employed; but the other sort of compulsion just described, compulsion *ab intra*, in this as in those other cases. On this occasion, it will seldom happen that the testimony of the defendant is called for, that he is put to the bar to be examined, till some other evidence, some extraneous testimony bearing against him, has been previously delivered. The question here is, whether he shall be prosecuted and committed, or liberated? From silence, as well as from evasive responsion, or false responsion, proved to be so by contradiction *ab extra*, or self-contradiction, the magistrate will draw his inference. To whatever evidence (direct or circumstantial) may have been brought out from other lips, the circumstantial evidence consisting of this silence, will constitute an addition of no unpersuasive kind.

In a word, the mode of collecting the testimony differs in this case from the best mode, by nothing but the want of the presence of the adverse party, with the faculty of pushing the inquiry to the utmost, as on the trial in civil cases: and to say the *best* mode, is as much as to say the most compulsive.

Perhaps the subordinate and unlearned judge *ad hoc*, imitating the tenderness of his learned superiors, will aid and abet the defendant with a piece of advice, which, on any other supposition than that of his being guilty, will be of no use to him. "Here is the question; but unless you have some falsehood ready, which you think may help to screen you, do not answer it."

Happily, the obligation attached to the situation cannot be altogether destroyed by this pious endeavour to destroy it. If the advice is taken, and silence preserved, the judge, with all his high-born learning, can scarcely keep himself from drawing that inference which common sense, unpoisoned by learning, cannot avoid drawing from such data. Though the answer should be a confession, he cannot convict; and though, instead of an answer, the silence he bespeaks be presented to him, he can scarcely avoid committing, and taking order for prosecution; and if, instead of silence, confession had come, he could have done no more.

## II. Civil cases at common law.

I. Procedure by action: preliminary sham inquiry, the pleadings. Here, as in the case of procedure by affidavit evidence, the compulsion, though indirect, is still compulsion, and the admission, as it were, merged in it. The principle of compulsion is not deduced *ab extrâ*, but innate as it were, arising out of the cause, and proportioned in force to the value at stake upon the cause. A mass of jargon, in the accustomed form, has been poured forth by your adversary's lawyers: employ your's to reply to it by a correspondent mass, or you lose your cause.

Had the object of the framers of this system been the attainment of the truth,—as in felonies it was the object of the legislature, in ordaining the preliminary examinations,—they would here have taken the same course: but (as any body may see that chooses it) their real and sole object was, to produce, for the sake of the profit

extractible out of the expense, that system of delay, vexation, and expense, which has been produced accordingly.

Compulsion (indirect as it is) there is no want of. Compulsion; but to do what? Not to deliver any thing that can serve for evidence; not to speak a syllable of truth, or of any thing that can serve to bring out the truth; but to pay lawyers for writing lies and nonsense.

2. Principal inquiry, sole real inquiry, the trial. Here no compulsion, any more than in a trial on an indictment or information. No compulsion; and (saving whatever difference there may be in respect of the value and importance of the matter at stake), the consequences, the mischievous consequences, the ambiguities, the inconsistencies, the same here as there.

### III. Civil cases: equity law.

In all those civil cases to which the jurisdiction of a court of equity extends, by one means or other the testimony of a defendant is compelled without reserve or disguise.

The question having been propounded, silence, silence as to the whole together, is taken for confession; an inference that would not be unreasonable, if the defendant were on the spot to answer for himself,—or if, instead of one man out of twenty, every man were rich enough to be able to speak in the only way in which a hearing is to be obtained.

But, where *appearance* is in question, command does not include permission, either in law or equity. In both places, men know their own business better than to suffer a cause to be begun in a mode which, in nine cases out of ten, brings it (as where *conscience* presides it is

actually brought, brought in the self-same hour) to an untimely and unprofitable end.

Propose, then, the constant question :—no other than the constant answer can be returned to it.

In equity law, the testimony of the defendant, is it compellable? Yes, and no. No, in the best, most natural, most efficacious, most prompt, least vexatious, least expensive mode. Yes, in an inferior, makeshift, accidentally (though but occasionally) necessary mode; drawn aside from the ends of justice by factitious delay, vexation, and expense.

Such, then, are the shifts to which a man is reduced, when straining to find a legitimate reason, or so much as the shadow of one, for any part of the mountain of abuse of which the technical system of procedure is composed. Vexation, fear of producing unnecessary vexation, is that the reason why the testimony of a party is not compelled, in the same mode in which it would be compelled were he an extraneous witness? To save the vexation of an hour, months or years filled with more corroding vexation, aggravated by a load of expense which to nineteen persons out of twenty is altogether insupportable? Here, as elsewhere, thus it is with those tender mercies, in the vaunting of which, neither the tongue nor the pen of the lawyer ever tires: begun in selfishness, continued in hypocrisy, it is in cruelty that they end.

After having been examined in his own station in this mode, the defendant is liable to be examined, with or against his consent, in the station of a witness, in a quite different, and (as

far as concerns the extraction of the truth in plenitude and purity) much inferior mode. But this case will come more fully and advantageously into view, when we come to speak of the case which presents divers persons on the defendant's side.

IV. Case civil: procedure by common law and equity together.

In speaking of the plaintiff's side of the cause, we had occasion just to note the fact, that in some cases, by the assistance of a court of equity, either party may obtain the testimony of the other, to be employed on the occasion of the *trial*, at common law. Either party, consequently the defendant:—but the plaintiff (*i. e.* he who means to become such) in the court of common law, is the party with whom the application to the court of equity, for that purpose, will most naturally and frequently originate.

In this most natural of the two cases, the person who proposes to himself to become plaintiff by action at common law, begins with occupying the same station in a court of equity. A bill having this for its object, is distinguished by a particular name: a bill of discovery.

Had the bosom from which it was to be drawn been that of an extraneous witness, the self-same testimony would have been compelled by an instrument called a *subpœna*, and delivered, in the best shape possible, that of *vivâ voce*, subject to counter-interrogation and counter-evidence on the spot,—delivered in the compass, perhaps, of a couple of minutes. By the assistance of a court of equity, it is obtained, in an inferior shape, without the security

afforded for correctness and completeness by the scrutiny of *viva voce* counter-interrogation; obtained at the end of as many years, perhaps, as it would have occupied minutes if delivered in the most trustworthy shape. I speak of minutes: for even though the article of testimony thus required be ever so simple, (authentication of a deed, for example, or communication of the contents,) a quantity of time more than sufficient for the circumnavigation of the globe, may be to be consumed in seeking for it.

As to the rational, the justifying cause, the ground, in point of justice and utility, on which, to the extent of this class of cases, the direct exclusion, coupled with the indirect and circuitous admission, rests; what it is not, and what it is, are points equally out of the reach of dispute. It is not the fear of deception; for the same testimony which is excluded in the more trustworthy, is admitted in the less trustworthy, shape. Still less is it the fear of producing vexation, *i. e.* vexation beyond necessity, and in excess. What fear then is it? It is the fear of not producing vexation enough: viz. that vexation of which there never can be enough, the vexation with which delay and expense, and the profit (official and professional) extractible out of that expense, keeps pace.

By a recent decision, if the mischief is in one part limited and kept from spreading, its inconsistency is increased.

In the station of an extraneous witness, in a dispute with which he has no concern, a man may, in the direct mode (under the subpoena without a bill) be compelled to deliver his tes-

timony, how heavy soever the burthen to which he thereby subjects himself; so it be that in speaking of it, the word *criminal* be not employed. A forfeiture to the amount of the whole of his estate may thus be imposed upon him, so it be that the forfeiture be not called a *forfeiture*.

If, for the extraction of testimony from unwilling bosoms, a bill be so much better an instrument than a *subpœna*, why not extend the application of it to extraneous witnesses? Unfortunately, the times admit not of any such improvement; it is now too late. In law, no abuse too flagrant to be cherished; but even in law, no new ones must now be made.\*

#### V. Examination of bail.

By the two words *opposing bail*, a sort of examination is denoted, which, anomalous as it is, has, and under the present head, a claim to notice. Two persons, whose relation to the cause is designated by that appellation,—a sort of parties added to the cause,—present themselves in court, and are subjected to an examination analogous to that which is called *cross-*

\* I have spoken of the case where, in connexion with oral testimony, written evidence is required; required at the hands of a person prompted by interest to suppress or withhold it. But to this purpose, neither common law nor equity, nor both together, are adequate: if a man who has money and resolution to stand out, when proceeded against in the regular course of civil procedure, ever produces a deed, or any thing else that he would wish not to produce, it is his attorney's fault. Powers such as unlearned magistrates exercise every day in cases of felony, with so much promptitude and success,—powers for tracing effects from hand to hand,—are altogether unknown to learned ones. Such promptitude accords not with the ends of judicature.

*examination* in the case of an extraneous witness. A species of examination this, which may be seen going forward any day, in any of the superior courts of Westminster Hall, the Court of Chancery excepted.

An action is brought; and (such is the established order of things) the defendant having, with or without necessity or use, been apprehended as a malefactor might be, — instead of being brought before a judge, for examination in the first instance, as a felon is, to be committed, or not committed, according as the necessity for that species of vexation has or has not existence, — is committed to prison in the first instance, — to a prison, with or without necessity, or (as a matter of favour) to a spunging-house: — that the money which might have gone to his creditors, may be shared among the lawyers, who have given themselves a better title to it. To liberate him from this vexation, two friends of his come forward, and engage themselves, in the event of the defendant's losing his cause, to do one of two things: to pay the money that he should have paid, or to give back his body to the harpies of the law. Out of court exists, having existed time out of mind, a sort of officer called the sheriff, a common subordinate to all the four courts, something between a constable and a judge: to purposes of vexation, a judge; to purposes of relief, any thing but a judge. As to the use of him in the present state of things, (I mean to the purposes of justice, — for to the purposes of established judicature he is of admirable use); conceive this personage, with his subordinates, interposed, in a cause before a court of conscience,

between the court and their beadle; in a cause before a justice of the peace, between the magistrate and his constable. This interposition supposed, conceive the improvement it would make in those instances, and you will have a tolerably distinct view of the necessity and use it is of, in the several instances in which it continues to have place.

The bail are now in court: for at that august seat of judicature the presence of those incidental parties, at that early stage of the cause, is as necessary as, at every other stage but the last, the presence of the principal parties is (for so it has been made) impossible.\* The bail are in court: a cause, a sort of incidental cause, is to be tried, viz. whether, to the purpose of affording to the plaintiff an adequate security for the performance of their engagement to him, they are in a state of solvency. If *unopposed*, the fact is sufficiently proved by their own statement, made in general terms, but upon oath: if opposed, the opposition is made by employing an advocate to counter-interrogate them: to put questions to them, in such detail as the patience of the court admits of, concerning the particulars of their property.

Without any such scrutiny, because without any power of administering an oath, this same

\* Amongst other purposes, it serves that of saving the lawyers in both stations the pain of an interview with the parties whose fate they are disposing of. The presence of an exasperated creditor is not more intolerable to an insolvent debtor, than that of either of them, but more especially of both together, is to learned benches. In the greater number of instances it would render a regular cause as prompt and unproductive, though the value in dispute were above 40,000*l.*, as now in a court of conscience where it is under 40*s.*

pair of guarantees, or another pair, (for, of the chaos of complication in which the business is involved, this diversification forms one of the ten thousand elements,) the same pair of sureties, or another pair, have already been received by the sheriff in another place: so that these sureties, whose sufficiency is to become matter of dispute, these same suspected persons have, if the suspicion be well grounded, had time to convey themselves out of the reach of justice.

Ask a lawyer, whether, in a civil case, and at common law, a party is ever examined,—examined in the way in which at the trial a witness is;—Answer—no, never. Ask him whether such a thing, if done, might not be an improvement;—Answer—*neminem oportet esse sapientiores legibus*. Ask him whether it could be done;—Answer—impossible, without throwing every thing into confusion, and overturning the very foundation of Blackstone's venerable castle, the sole defence of English liberties.

Ask him whether he has ever heard of a sort of person called a bail; whether a bail is not, to the purpose of eventual responsibility, a party; and whether he never heard a bail examined,—examined just as he might have been had the court at the time had a jury in it, and he been a witness on that same side;—Ask him, once more, whether he has not heard of a sort of a thing called an *estoppel*;—and whether there be not that in it that shall be a *bar* to his plea of the impossibility of examining a party at common law, without blowing up the old castle;—Either you will find him standing mute, like a prevaricating witness,

struck by a flash of self-contradiction, or if he says any thing, it will be to some such effect as this:—A bail, party or not party in effect, is not a party in name: we never look beyond names.

Would it be less conducive to the ends of justice, to examine in this same mode, and for this same purpose, one principal party at the outset of the cause, than two subsidiary, and perhaps unnecessarily subsidiary ones, in the course of it? Would not the solvency of the debtor himself, be rather better worth knowing in the first instance, than that of two strangers? Might it not be better to know from himself whether he be solvent or no, than to begin with sending him to a jail or a spunging-house, and perhaps make him insolvent, for fear of his being so?—Answer,—May be so; but why talk to us about the ends of justice? What have we to do with them? What business is it of ours to look at the subject in any such point of view? What should lead us to it? Who would pay us for it? Who would so much as thank us for it?

What is that sort of information which is got from a man, under the name of bail, at common law, in the course of a few minutes? Exactly the same sort of information which, under the name of a defendant, would be got from the same man in equity, with less security for correctness and plenitude, at the end of as many months: if, for example, he were an executor or administrator, having possession of a mass of property, out of which the plaintiff, a legatee or creditor, called for his share.

In the examination of bail, if the account

obtained by the inquiry be sufficiently detailed and satisfactory to prove a mass of property adequate to the sum for which he binds himself, there the inquiry stops, as in this case it is fit it should. In the case of the executor, it may be necessary it should go further: it may be necessary it should go to the utmost. Extending over the whole mass, and (to shew that nothing is omitted) exhibiting a separate view of every elementary part of which that aggregate is composed,—it would be inadequate to the purpose, if a statement framed with that deliberation of which written discourse alone is susceptible, did not accompany, or rather precede, the elucidations extracted by *vivá voce* interrogation. In the case of the executor,—to the *vivá voce* responses, a document of this permanent nature (in equity practice in fact a succedaneum) should in propriety be a supplement, a concomitant, or a preliminary. In the case of the bail, it would not so constantly be necessary to justice. But even in that case, instances in which it would be necessary, present themselves in every day's practice. Before the income tax, unless where extracted by a bill in equity, an occurrence of this sort was without example; therefore it was impossible. Now it has existed, and existed in every house; therefore it is not impossible. Good logic in a court of common sense, if not in a court of common law.

VI. Case criminal : procedure summary.

The guards to Blackstone's castle (the castle of lawycraft) are numerous and vigilant. But the fortifications they have to defend are extensive: the assailants, though scattered and

undisciplined, not a few. Here and there, in some neglected quarter, reason will steal in and take post : one precedent lets in another.

Jurisprudential law is law made by lawyers, for the benefit of lawyers : statute law is law made by the guardians and representatives of the people, for the benefit of the people. Procedure called regular, is the work of jurisprudential law : procedure called summary, of statute law. Jurisprudential law is the miserable makeshift of inexperienced ages : statute law, the regular work of power and experience, operating upon the raw materials shot down here and there by jurisprudential law. As the sun rises, fogs disperse ; as statute law advances, jurisprudential vanishes.

The legislator, who, in the reign of Philip and Mary, introduced the preliminary examination of defendants, in cases of felonious offences, by single justices of the peace, ventured not to intrust those magistrates with the power of deciding upon the evidence so collected : that power was reserved for a jury. Saving here and there an exception too intricate and absurd to be here particularized, a felonious offence was in those days a capital offence : *felony* meaning then (what unclergyable felony means still) an inexplicable cluster of *punishments*, of which the only efficient and comprehensible one is that most absurd, and to English minds most favourite, of all punishments, into which all others are gradually ripening, *death* : felony, the punishment ; and (by a figure of speech congenial to jurisprudential rhetoric,) the name of the punishment become the name of an offence. But the power of life and death was

too much to be intrusted to a single magistrate; and as to the applying, to any offence that had ever been punished with death, any inferior punishment, it was a sort of anticlimax not at all to the taste of that age, nor much, as yet, to the taste of any age.

Depredations, of which this and that particular sort of article were the subject, having excited the passion of revenge in the bosom of the owners of the individual articles; and these individuals happening to possess the requisite share of influence with the legislative body,—a fresh exertion of legislative authority came (as usual) to be made. Though the rules of jurisprudential law are all of them *ex post facto* laws, having all the bad properties of that sort of law, with that of uncertainty to boot; the iniquity of the practice, when applied to statute law, seldom fails to be recognized. Feigning notice where there is none, lawyers, who, at so easy a price as the saying the thing that is not, have established themselves in the habit of dealing with men as they please, punish for what is past: legislators, acting in their own character, shrink with just horror from such injustice. But though the individual offence escapes unpunished, it is still the individual offender that is in view. Rarely do the optics of the legislator carry him beyond individual objects; to stretch further, were it possible, might scarce be prudent: it would be abstraction, speculation, theory: sounds employed by politicians who have not the gift of thought, for pointing the current of jealousy against those who have: means employed by him who has power without understanding, for keeping him

who has understanding without power from giving the public the benefit of it. Here it was the bird came and perched : in hopes of catching that same bird, the net, a spick and span new one made for the purpose, is spread exactly in the same place. Such is the logic of your practical statesmen.

Finance excepted (an important branch of legislation, but not the only one), the care of the laws is not the charge, nor therefore the care, of any man. Method, consistency, are never thought of: what does not exist, cannot be disturbed. Lawyers love confusion: lawyers fatten on it: non-lawyers, born and bred with the yoke of the lawyer about their necks, if haply they have the wish, have not the wit, to remedy it.

A quantity of lead and iron had been stolen: passions kindled, resolution taken to catch the thief if possible. Lead and iron have been stolen, and the thieves not punished: ergo, the laws against stealing lead and iron are insufficient. The laws against stealing lead and iron are insufficient: ergo, fresh ones must be made. The thieves unpunished: but how happened it? Because the fact could not be proved upon them: and how happened it that it could not be proved upon them? Because, when questioned about it, they knew better than to answer. Was it there the shoe pinched? this shews us how to frame the remedy. When a man is taken up for stealing lead or iron, provide that, if he won't answer, and answer to satisfaction, it shall be concluded that he stole it, and he shall be dealt with accordingly. Ay, but this is making him criminate himself: that

is against the rule which forbids the putting it to a man to accuse himself: a mode of procedure which lawyers abhor, except where they find their account in practising it, and which non-lawyers, taking the interested clamour of lawyers for the voice of reason, abhor without reason.

True; and therefore we must not think of hanging, or so much as transporting upon such evidence. But a penalty really inflicted, such a penalty, be it ever so trifling, is better than a penalty, be it ever so severe, which is not inflicted: a substance, be it ever so small, has more stuff in it than the largest shadow. To make sure, say forty shillings and no more. To a member of parliament, forty shillings is as nothing: confine the penalty to forty shillings, what the evidence is, will be an object not worth inquiring about.

So much for the penalty: then as to the jurisdiction; for that too must be changed. Before a jury? No; it cannot be: before them, putting questions to the defendant would never do: they are not used to it: they would not come in to it: besides that, before the matter could come to them, the thief would be prepared and over-prepared. With this description tacked to it, the offence, if it come any where, must come before a justice. Singly or in pairs, when acting in this mode, people (it is true) are not used to see justices trying theft, and trying it without a jury. But penalties of forty shillings, and ten times forty shillings, are levied in this manner every day: therefore, confine the penalty to forty shillings: say nothing about theft, nor any thing about

questions, interrogations, or examination; mask the questioning by words which imply questioning without expressing it; lawyers will not see what you are about, or other people will not mind them: and thus, with friends and fortune on your side, your bill will pass.

Thus spake the bold, and fortune favoured them. Like the Lesbian rule of old, the rule bent, the bar opened, and let in protection for the two favoured metals.

Forty shillings' worth of lead or iron being worth forty shillings, how much less is the worth of forty shillings' worth of any other thing? Such is the question which common sense might have put, had she dared to raise her voice. But either she was not there, or she did not dare: had she spoken thus loud, lawyers would have taken the alarm, and protection, instead of being extended to other things, would have been lost to the favoured metals.

The direct course would have been free from danger: the indirect, the evasive course, teems with it. I speak of the danger which threatens innocence.

Pressed by pursuers, were a thief in a crowd to slip a purse into your pocket without your perceiving it, or to let drop a quantity of lead or iron into the area before your house, while you and your family were asleep; were any such chance to happen to you, to the satisfaction of what justice could you shew how you came by it? The eye that reads this, sees, probably, no such danger in its own case: opulence and character afford you protections of stronger texture than are to be found in the

tenor of this law: but, turning your thoughts for the moment, if your mind be strong enough, put yourself into the rags or the cellar that shelter the honest shoe-black, who waits for custom near your door.

Metals, "lead, iron, copper, brass, bell-metal, or solder:"\* cause to suspect that any such article, having been stolen, is concealed in such or such a place: complaint, on oath, to a justice of the peace, of the existence of such cause: warrant from such justice to search accordingly, in the day-time; finding therein accordingly: warrant thereupon, by such single justice, to cause the same, and the person in whose house, or other place, the same were found, to be brought before two or more such justices. These preliminaries adjusted, then comes the clause authorizing the extraction of self-criminating evidence. If such person shall not give an account, to the satisfaction of such justices, how he came by the same, or shall not, in some convenient time, to be set by the said justices, produce the party of whom he bought or received the same, he shall be adjudged guilty of a misdemeanour. Penalty for the first offence, 40s.; for the second, 4*l*.; for every subsequent offence, 6*l*.; so that, if there were not other laws, by which, in case of other sufficient evidence, these same thefts are punishable under the name of theft, and with a degree of severity which certainly cannot be charged with insufficiency, this law, instead of being a prohibition, would operate as a license.

Give an account, to the satisfaction of such justices, how you came by the same?—or, in

\* 29 Geo. II. c. 30.

some convenient time, to be set by them, produce the party of whom you bought or received the same? If, as before supposed, you know nothing either of the thief, or of the stolen goods,—the same, after having been stolen *out* of some other place, having been stolen *into* yours, without your knowledge,—how should you? The probability is, that, notwithstanding your giving no such account as is required, and on failure of which, the justices are required to convict you,—the probability is, that, you being innocent, they would not convict you. Be it so: but if so it be, then the case comes to this: that the magistrates, instead of pursuing the law of the land, pursue the law of reason; and that, instead of extracting, or rather receiving, testimony from you (the defendant), in an imperfect mass, according to the terms of the statute, they extract it from you in a complete state,—in that state in which (you being, by the supposition, willing) they would have extracted it from you, had they dealt with you, the defendant, as they would have done with any extraneous witness; or if, dealing with you as a defendant, they had examined you as persons apprehended for felony are examined, under the statute of Philip and Mary, for the purpose of being committed, or not committed, for trial, and as defendants charged with any sort of crime are examined under Roman law, for the purpose of being convicted or not convicted.\*

\* One law for one sort of metal; another for another: one law for *lead*, with its etcæteras, as aforesaid; another for *pewter*. (21 Geo. III. c. 69.) Fancy not, that the  
ter should have been stolen ever so much to the

tion" of such two justices, it would be in their power to punish for the theft upon such evidence, or upon any evidence.

Moreover, lead, iron, and copper, are unmixed metals; brass, bell-metal, and solder, are, as well as pewter, mixed ones. But, out of any two metals that will mix in any proportions, without limit, you can make as many different sorts of mixed metals as you please: *a fortiori*, out of all the unmixed ones, taken in the aggregate. Of these mixtures, (not to speak of possible existence) besides the three that are mentioned, many there are that have actual existence, under actually existing names: pinchbeck, bronze, and so forth. Tinned copper, is it copper?—tinned iron (commonly called tin simply), is it iron?—steel (iron compounded with a minute proportion of carbon), is it iron, under the act? Forty shillings' worth of any one of the many non-enumerated metals, how much more or less is it worth,—how much more or less well entitled is it to the protection of the law in general, and of this law in particular (if the protection given by it be a proper one),—than forty shillings' worth of any one of the few enumerated ones?

Against the enterprizes of depredators, while sugar is in the same rational and therefore extraordinary way protected, honey is left unprotected; while iron is protected, manganese is unprotected; while turnips are protected, parsneps are unprotected; and so on without end. When honey, manganese, or parsneps, are the things stolen, it is a wrong and a cruel thing to make the thief accuse himself: when sugar, iron, or turnips, it is all right.

It is in this way that the existing chaos might be made, at any time, a hundred times as bulky as it is; and, at the same time, and by the same means, a hundred times as deficient as it is.

Such are the consequences, while a prejudice,—which (unless all these clandestine laws, for there are more of them,\* are so many petty nuisances) is itself a mighty nuisance, calling aloud for eradication,—is, instead of being eradicated, pruned.

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\* 2 Geo. III. c. 28. commonly called the Bumboat Act, confined to the Thames:—forty shillings' worth of goods stolen on or near the Medway or Severn, being worth more or less than forty shillings' worth of goods stolen on or near the Thames.

See also the Thames Police Act. Also, 43 Eliz. c. 7., and H. c. 2., relative to wood-stealers.

## CHAPTER IV.

IMPROPRIETY OF EXCLUDING THE TESTIMONY  
OF A PARTY TO THE CAUSE, FOR OR AGAINST  
ANOTHER PARTY ON THE SAME SIDE. EX-  
AMINATION OF THE COURSE PURSUED IN  
THIS RESPECT BY ENGLISH LAW.

SECT. I. — *Absurdity of the exclusion.*

IN this more complicated case, as in the former more simple one, the task of determining what is right, receives not from the complication any additional difficulty. Already, over and over again, the determination has been formed for all cases: but the difficulty of examining and exposing what is wrong, receives, from the same cause, an enhancement much to be regretted.

On this part of the field, as on every other, the rule of simplicity, the purest simplicity, will be seen to be the rule of utility and reason: the system of complication, to be a system of absurdity, inconsistency, and injustice, in all its shapes.

Of this case the modifications are,—

I. Plaintiffs more than one. First question: Shall each be admitted, if willing, to give testimony at the instance of the other? Second question: Shall each, if unwilling, be com-

pellable to give testimony at the instance of the other?

II. Defendants more than one. In this part of the case the questions likewise are two, and of the same import. Shall each, if willing, be admitted,—shall each, if unwilling, be compellable,—to give testimony at the instance of the other?

In this case, over and above all accidental anomalies and incongruities, a curious absurdity is generated by the very nature of the general rule. Parties, how numerous soever, being excluded; while, in the character of an extraneous witness, the testimony of a single deponent is sufficient to warrant, and (if clear of contradiction, as well from within as without), in a manner to command, decision;—a single tongue obtains thus a certain victory over a thousand, that would have sounded in contradiction to it, had they been suffered to be heard. Every defendant is, *par état*, by his station in the cause, a liar: a man who, if suffered to speak, would be sure to speak false, and equally sure to be believed. Every defendant is a liar. But every human being may, at the pleasure of every other, be converted into a defendant. Therefore, and by that means, every human being may, at the pleasure of every other, be converted into a liar, and, in that character, his capacity of giving admissible testimony annihilated. The *jus nocendi*, the power of imposing unlimited burthens by calumnies not suffered to be contradicted, is thus offered constantly upon sale, to every man who will pay the price for it.

SECT. II.—*Plaintiffs more than one—Examination of this case.*

EXAMINE the subject in detail, you will find the mischief, as well as the absurdity, diversified by no small variety of modifications; none having any reference to the ends of justice, all arising out of the different modifications of the form of procedure:—modifications agreeing but in two things: their subservience to the ends of actual judicature; their repugnance to the ends of justice.

In the first place, let the multiplicity be on the plaintiff's side.

I. Plaintiff's testimony, is it admissible in favour of a co-plaintiff?

1. In cases called criminal (from what has been brought to view already, it may be easily inferred) the multiplicity is not productive of any additional injury to the interests of truth and justice. Where there is but one plaintiff, one prosecutor, his testimony is not excluded by the interest he has in the cause. As the testimony of one is not, so neither would that of two or twenty, if there were so many; but there are not usually more than one.\*

\* In the case of an indictment, where the offence comes under the denomination either of a felony, or of a breach of the peace, there is usually some person (and but one) who, before the justice of the peace by whom the preliminary examination has been performed, has, by an engagement called a recognizance, been bound to prosecute. By this engagement the personality of the prosecutor is fixed.

2. Case called *civil*; mode of procedure, action at common law. Neither in this case, plaintiffs (*i. e.* persons having need to appear in that character) being plural,—neither in this case, in the hands of a well-advised attorney, need there on that side be any dearth of evidence. Two persons attacked and beaten by four: each of the two brings his action, supporting it by the testimony of the other. Two suits are thus manufactured out of one. So agreeable a circumstance may help to account for the establishment of the rule, and may be not unfriendly to the preservation of it.

But suppose a claim of the pecuniary kind, with or without injury, in short a *demand*, preferred by two persons linked together by the tie of one common title: two tenants in common, two joint-tenants. Here, either both individuals are obliged to join in the suit, and thence become both of them plaintiffs; or, if one be plaintiff, and excluded on that score, the other is an interested witness, and excluded on that other score. True; but in the character of a purge to carry off the fæces of interest, the virtue of a release has been already brought to view:\* to each of them let this specific be administered by turns; the peccant matter is discharged out of him, and he becomes a good witness for the other. True it is that the specific, admirable as it is, is not equally well adapted to the constitution of every case. Suppose two persons partners in trade; there might be an awkwardness in the arrangement,

\* *Suprà*, pp. 183-4.

were each partner, as the exigency of the suit required, to give up his share of the business to the other.

To pursue the inquiry through the whole field of actions and actionable cases, would probably be thought rather a superfluous task. What, for the purpose of illustration has already been brought to view, may appear proof sufficient for the establishment of three facts: that in one set of cases, admission for the testimony of persons in the situation of plaintiffs may be gained; that in another it cannot be gained; and that in neither has the distinction any thing to do with the interests of truth and justice.

A corollary is, that, in some cases, there may be a convenience in this sort of community of interests. As one good turn deserves another, each associate may thus, in his turn, discharge himself of his peccant matter, for the benefit of the other: whereas, when, in point of interest, a man has the misfortune of standing alone, it may not be altogether easy for him to discharge his bosom of peccant matter, for want of a friendly bosom to empty it into.

Could any thing be done by a sale without warranty? or if with warranty, might not the interest attached to the warranty be purged off, as well as interest in other shapes, by the universal elixir? Apply this to immoveables and to moveables: to property, real, personal, and incorporeal: learning, curious learning, in any given quantity, might be spun out upon this ground.

3. Case called civil; mode of procedure, bill

in equity. The mode of pursuing, or professing to pursue, truth, being altogether different, according as, in pursuing it, you pronounce the word *law*, or the word *equity*, — a different field is thus opened for the exercise of professional ingenuity. The virtue of the purge is no less acknowledged in equity than in common law; but if reciprocity be the condition, and the suits, instead of contemporary, are to be successive, the condition of those who have to wait will be still more awkward here than at common law.

Equity procedure is peculiarly adapted to the treatment of complex cases; or, to speak more properly, when a case becomes to a certain degree complex, in any mode pursued at common law it is so utterly impossible to administer any thing that shall have so much as the semblance of justice, that cases of this description are shaken off, by necessity, into the lap of equity.

If, in the field of common law, the inquiry might find matter for one volume; on the ground of equity law it might find matter for another. Of the matter peculiar to equity, I shall content myself with giving one specimen: for illustration it will be sufficient, and more will hardly be desired.

In equity procedure, in a multitude of cases it will happen, that whether a man shall be plaintiff or defendant is matter of contingency, matter of choice, as parties happen to agree.\*

\* All the witnesses to be disposed of by the court, must be before the court, must have the opportunity of defending

In regard to co-defendants, the rule in this behalf (as there will be occasion to state presently) is, that they cannot, in favour and at the instance of a plaintiff, be made to testify one against another:—but, for himself, any defendant can employ the testimony of any other co-defendant, as extracted by the interrogatories administered to him on the plaintiff's side. Suppose, then, three persons, Primus, Secundus, and Tertius, who, in the most natural order of things, would have been co-plaintiffs; but Secundus and Tertius stand in need of each other's testimony: instead of plaintiff's let them be made defendants, leaving the part of plaintiff to be played by Primus alone, and the problem is solved.

II. Plaintiff's testimony, is it compellable at the instance of a co-plaintiff?

The modifications of this case are soon disposed of.

1. Cases called *criminal*. On an indictment (as already stated) it is neither natural nor usual that there should be more than one real plaintiff, more than one prosecutor. Supposing more than one (two, for example), it is not natural that they should have become such, without such an agreement as would be incompatible with compulsion at that time. Men who agree one day, may, indeed, disagree the next; but if both are bound to prosecute, both are bound also to give evidence. But, bound or not bound to prosecute, no individual being in a

themselves. Will you join with me in my bill? No. Then I must put you upon the list of defendants.

criminal case recognized in the character of plaintiff, there is no individual (defendants excepted) who is not bound to give evidence.

The case is, in this respect, much the same on an information. It is different, and indeed opposite, where the prosecution is by motion for attachment. In those cases, all testimony is received in no other form than that of affidavit evidence. On trial by affidavit, every body testifies that pleases; add — and nobody that does not please.\*

Affidavit evidence is moreover (as has been already observed) the sort of evidence, the only sort, that is received on the preliminary and worse than useless inquiry, which, for the benefit and by the hypocrisy of the man of law, under the mask of tenderness, has been made to precede the trial on an information: as likewise on the supplemental inquiry, by which, in case of conviction, as well on indictments as on informations, the trial is succeeded, —and on which, on the occasion of the original offence, the defendant may, without other evidence, be convicted of succeeding ones. For it is a rule, an inviolable rule, with learned

\* No man is compellable either to make, or to join in, an affidavit. Parties are virtually compellable, by the interest they respectively have in the cause: the prosecutor, lest he should fail in obtaining the service demanded; the defendant, lest he should be bound to render that burthensome service. Extraneous witnesses are at perfect liberty; they take part with one side or another, as interest (self-regarding interest or sympathetic) prompts them: so that here you have no witnesses but partial ones, and these free from the check of cross-examination: their testimony delivered in the least trustworthy form that can be found for it.

judges, never to receive testimony when it is for their own use, but in the most untrustworthy of all forms. Compulsion is, therefore, out of the question in all these cases.

In the case of felonies, on the preparatory inquiry performed by a justice of the peace antecedently to the trial, the testimony of every person without distinction is compellable, at the instance, as well as by the authority, of that magistrate. Thence, supposing in the first instance two prosecutors, and reluctance to supervene on the part of either, his testimony might, at the instance of the other, be compelled notwithstanding, viz. by the authority of the magistrate.

In the same cases, the same obligation extends to the other preparatory inquiry, viz. that before the grand jury; supposing it preceded by the inquiry before the justice of the peace.

But in such indictable offences as do not come under the denomination either of felonies or breaches of the peace, no such previous inquiry before a justice can take place: nor in felonies, though usually, does it necessarily take place: still less in breaches of the peace. In these cases, therefore, probably, as in attachments certainly, justice is, on this occasion as on so many others, left to take her chance. On the inquiry before a justice, the mode of compelling attendance for the purpose of testification, as well before the grand jury, as on the trial before the petty jury, is by an engagement called a *recognizance*; into which, prosecutors, as well as extraneous witnesses, are by that authority, and on that occasion, compelled to

**enter:** one person usually (possibly, in some instances, more than one) undertaking, by one recognizance, to prosecute as well as testify; another, or others, undertaking, by another recognizance, simply to testify, nothing being said of prosecuting.

Is there any other mode of compelling the appearance of a man, in either character, before a grand jury? None that I can find in the books: I know of none.

2. Cases called *civil*: procedure, by action at common law.

Compulsion is here altogether out of the question, as between plaintiff and plaintiff. We have seen how, in some cases, two men, having each of them the sort of interest that a plaintiff has in the event of the cause, may each purge himself of the legal part of that interest, while the moral part keeps its hold as firmly as ever in his breast. But where the patient is a human creature, this, like other purges, supposes consent: a suitor cannot be purged with a drenching-horn, like a horse.

3. Cases called *civil*: procedure, by suit in equity.

In the case of a single plaintiff, we have seen, that in that character a man can never be compelled to give testimony,—and also for what reason. The same reason would, if there were a thousand of them, be equally conclusive.

SECT. III.—*Defendants more than one—Their testimony in favour of one another, how far excluded by English law.*

I. CAN the testimony of one defendant be received in favour of one another?

1. Cases called criminal: procedure, by indictment or information.

In these cases, as in all others, the station of defendant is a situation to which the plaintiff nominates: it depends not upon the nominee to resign it; if so, it would not be often filled. For the purpose of the principal inquiry, called the trial, a man cannot indeed, under this mode of procedure, be stationed in it without the fiat of a grand jury: but, unless the story appear preponderantly improbable, that fiat will naturally be (at least it ought to be) commanded by the evidence: and it is the characteristic of this species of inquiry, to hear evidence but on one side.

In this case, when the inquiry is the principal one (the trial), can a defendant, with his own consent, at the instance of a co-defendant, give testimony in favour of such co-defendant? No, and yes. No, in words: yes, in effect. No: for in that situation, let a man say what he will, it is not evidence. No oath can be administered to him: not a question, as we have seen, can be put to him by any body. Yes, in effect: for to the defendants, to each of them, be their number what it may, liberty is always given to say, or to read, whatever he may think proper, under the name of his defence. Being allowed to say whatever he

thinks fit,—if, in what he says, there be any thing capable of operating in favour of a co-defendant, — what he thus says in favour of another, will naturally operate upon the mind of the jury with no less persuasive force—will naturally, if there be any difference, operate with more persuasive force—than any thing which, more particularly or exclusively, operates with the like tendency in favour of himself.

As to affidavit evidence, and as many inquiries (whether principal, preliminary, supplemental, or sole) as are carried on in this un-inquisitive mode, and as many sorts of demands (penal or non-penal) as are judged of by the light of this most commodious sort of evidence; we shall find, in the case of co-defendants, admission standing upon the same easy footing as we have seen it stand on in the case of co-plaintiffs. With the pen of an attorney to speak through, let a man present himself in the garb of a witness,—be he who he may, party or not party, interested or not interested, perjured or not perjured,—be the occasion what it may,—thus introduced, all doors and all ears are open to him.

2. Cases called civil: procedure, by action at common law.

In the case of plaintiff and co-plaintiff, the efficacy of mutual good offices and of purgative releases has already been brought to view. But, even in that more manageable case, we have seen it limited; and, as between defendant and co-defendant,—if the action be of the number of those in which conduct of an injurious nature is imputed,—the specific is, of

course, in this difficult case, no more applicable than in that more easy one.

In a case of this sort, as it is not necessary for the defendant or defendants to be present during the trial, so neither is it altogether natural or usual: whatever a man, guilty or not guilty, can find to say in his defence, he in general regards it as more eligible to trust to the learning and eloquence of his advocate, than to any chance he may have of gaining credit for any thing he might wish to say, either in his own favour, or in favour of a fellow-defendant, in the character of testimony, though not allowed to be delivered under the technical name of evidence. The sort of presumption here supposed, is of very rare occurrence. Certain it is, that it will not experience either much inward satisfaction, or much outward encouragement, from the learned and eloquent gentleman, to the remuneration of whose learning and eloquence his money (if he has any) has been applied. If he is guilty, their opinion will be (and in this case it will probably be a just one), that the duty of demonstrating his innocence cannot, with equal probability of success, be either trusted exclusively to any but themselves, or so much as divided with themselves. If he is not guilty, any endeavour which he may be inclined to use to make known his innocence, will naturally be regarded as a sort of invasion of their rights. Success depends not upon truth and justice, but upon that sort of learning which has been created for the purpose of being made the subject of a monopoly: of that monopoly,

of which, at the expense of so much money as well as so much labour, they have obtained their share.

Where punishment of so high a nature as that which is attached to offences of the rank of felony, is at stake, the judge is naturally averse to the task of suggesting any observation, the tendency of which may be, unjustly, or even justly, to diminish the chance which the defendant may have of making his escape from the severity of the law. To the case between individual and individual, in which one cannot lose but the other must gain, this sort of tenderness does not (for the demand created for it by popular prejudice does not) extend. In summing up the evidence on the trial of an action, the judge would say to the jury without scruple, "Gentlemen, the defendant Nokes has said so and so in behalf of defendant Stiles; but the law requires you to lay all this out of the case; for it is not evidence."

In all purely pecuniary cases, to which the virtue of the mendacity-fuge diaphoretic does not extend; the natural effect which, in the case of a plurality of defendants, results from the exclusion put upon the testimony of individuals in this situation, has already been brought to view. In English jurisprudence, in the class of cases here in question, this mischief operates with undiminished strength. To rid himself of a troublesome witness, an unscrupulous plaintiff has no more to do than to put him upon the list of defendants. Seeing a man upon that list, a learned judge wants nothing more to satisfy him, that the testimony

of that man (be he who he may) is unworthy of all regard; and to engage him, of course, to give his assurance to the jury to the same effect.

If, indeed, to the same purpose, on the same occasion, the testimony of the same individual had been presented in the form of an affidavit, unchecked by cross-examination, the case would have been very different: it would then have been good evidence; and, like the testimony of any extraneous witness, have passed with him for what it was worth.

Nay, but the plaintiff has no such power: we are aware of the mischief, and have provided against it: he may put a witness, if he pleases, upon the list of defendants; but if no evidence is given that affects such defendant, his testimony is received notwithstanding.

Yes, verily: provision you have made; and against this abuse with about as much felicity and about as much zeal, as against that mountain of abuse which is the source and measure of your profit. Every man who has a farthing to gain by lying, will always be sure to lie: this is your theory: this is what you are bound by: you are *estopped* from questioning it. If he be not, on what pretence do you exclude a defendant from delivering his testimony at the instance of a co-defendant? If, in a case affording, in point of moral interest, two plaintiffs, one of them has been cleared of legal interest, by the name of prosecutor, or by the relaxatory purge,—and the purge, though it has given him competency, has not given him veracity along with it,—to strike the de-

defendant witnesses dumb, if there be a dozen of them, what has he to do, but to say a word or two against each?

Nay, but the case you are thus bringing out against us is an extraordinary case.—Not so very extraordinary: but, however, take this, which is but too ordinary a one. Plaintiff, there is but one: witness, an extraneous witness: witness, but that one, which is sufficient. But this one witness is a liar: bound to the plaintiff's side, either secretly by the only interest that you acknowledge to have any influence, or by any or all of the other kinds of interest put together: is it more unreasonable to suppose one liar on this side, than a dozen on the other? For if you are not sure of their being liars, or even if you are, what should hinder you from suffering them to be heard?

But it is vain to argue without data. The matter in dispute being given (and now let the case be a purely civil one, nothing of injury supposed), the question is, whether the testimony of the defendant, called for by a co-defendant, will or will not be trustworthy. His trustworthiness depends,—not upon the cause, or the relation the man bears to the cause,—but upon the station, the judicial station, which, at the instant of pronouncing the decision, you, his judge, happen to occupy. On this, as on so many other subjects, tell me your station, I will tell you your opinions: unless your station be ascertained, you know no more what your opinions are on the bench, than you knew what they were while at the bar, till you knew

plaintiff or the defendant

... or a master of the  
... a true man. Are you a  
... Bench? He is a liar, and  
... receive your jurymen, as sure  
... them to hear him. Being a  
... King's Bench, are you, moreover,  
... of the great seal? The man is  
... untrustworthy, according as you  
... side or the other of a narrow  
... Are you a baron of the Exchequer?  
... water changes backwards and forwards,  
... you being at any such trouble as that  
... the passage:—from the same bench,  
... without stirring, you serve out *law* or *equity*,  
... ever happens to be called for: if it be  
... the man is a liar; if it be equity, he speaks

Tell us, then, what is law, tell us what is  
equity: these are both of your own making:  
... whatever you are in the mood to make it.

The tissue of inconsistencies and absurdities  
is not yet at an end. In what court is it that  
the testimony of a defendant, called for by a  
co-defendant, is not receivable? In the court  
where, in case of mendacity, the most effectual  
means of exposing it are in use. In what court  
is it that the testimony from that same source  
is receivable? In the sort of court where no  
such means are suffered to be employed. In a  
common law court, there is cross-examination.  
True, provided a jury be there to hear it,—not  
otherwise. In a common law court, there is  
cross-examination: in an equity court, there is

**CROSS-EXAMINATION** : in both, the cross-examination is the same sort of thing, in the eyes of those to whom the most different things become the same thing when called by the same name. Common law cross-examination,—questions put in public, by the advocate of the party, to the deponent (were he to depose), after the questions put on the other side, with the answers to them, have been heard. Equity cross-examination,—questions put in private, by a clerk, who, unless bribed, cares not a straw for either party, nor for any thing but the getting through his task with the least possible trouble : questions framed for him by a person to whom it was not possible to know a syllable of what the deponent would say, in answer to questions put on the other side.

Tell me then, once more, on what bench and under what name you sit, and I will tell you what you will think ; or at any rate (if the term *thinking* be improper) what you will do. Is it your business to cancel papers,\* or keep rolls?† The sham cross-examination is the only one that you will suffer to be made : and it is upon the strength of this mock security, that you will give your confidence to the defendant's evidence. Is it your business to hear pleas before the king himself, when he is not there?‡ Nothing less than the true cross-examination will serve you ; and with this best security at your command, forasmuch as you can get nothing better,—in this case, to make sure of hearing the truth, and the whole truth,

\* Chancellor.

† Master of the Rolls.

‡ Court of King's Bench.

you shut your ears against the evidence. Are you that double sort of man called a lord commissioner of the Great Seal; or that other double sort of man called a baron of the Exchequer? The true and the sham cross-examination are the same thing to you: but, at any rate, with the good security in your hand, your ears are shut against the evidence: with the bad security, they are open to it.

Be this as it may; whether you are the single sort of man, or the double sort of man, you are at any rate that other sort of man, in whose judgment, (where it is by himself that the decision is to be formed), no examination at all, is a better way of coming at the truth, and the whole truth, than either the good mode of examination or the bad one. Should the man be sitting or standing opposite you, you know better than to put a single question to him, or to suffer one to be put to him by any body else. It must be through the pen of an attorney, if you hear him; and through that medium you hear any body.

Instead of missing, would you wish to find, the truth? Instead of common law and equity, would you wish to administer justice? Instead of learning and science, would you wish to judge according to common law and common honesty? Go to any court of conscience: go to the study of any country justice. Learn there to forget your learning: in that oblivion you will find the beginning of wisdom. Among the shopkeepers, more surely; for before their court hangs a curtain, behind which (happily for the great body of the people) eyes such as yours have not been allowed to penetrate. In

the study of the unlearned magistrate, more sparingly: you must there content yourself with such remains of wisdom, as your vigilance has not yet succeeded in rooting out of it.

II. Can the testimony of one defendant be *compelled*, at the instance of another?

1. Common law. Case, criminal: procedure, by indictment or information: occasion, the principal inquiry, the trial. The answer, in this case, is clearly in the negative. In the very nature of the case, obligation to testify supposes interrogation. But, on the trial, no question can be put to a defendant by any body: therefore, not by a co-defendant.

2. Law, common or equity: case, criminal or civil: procedure, by indictment or information: inquiry, sole, principal, preliminary, or supplemental: form of testification, affidavit evidence. Whenever the evidence is delivered in this form, the answer must still be in the negative. No interrogation, no compulsion: and affidavit evidence is, being interpreted, uninterrogated evidence.

3. Common law: case, civil: or, (if in some respects considered as criminal, and spoken of under the name of penal,)—procedure, still by action. Answer still in the negative! No interrogation, no compulsion: no question can be put to a defendant by any body; therefore, not by a co-defendant.

SECT. IV.—*Defendants more than one—Their testimony against one another, how far excluded by English law.*

CAN the testimony of one defendant be compelled, to the disadvantage of another?

### 1. Criminal cases.

Procedure, by indictment: occasion, the principal inquiry, the trial.

To an individual in this situation, no question, as already observed, can be put by any body: therefore, no evidence, to the prejudice of one defendant, can be thus extracted from any other. In regard to any statement that may happen to flow spontaneously from the lips of a defendant, speaking in his own defence (as above), the same observations as above are applicable: with only this difference, that, when any thing that falls from a person in this suspected situation presents itself to the judge as operating to the disadvantage of another individual in the same predicament, — the nullity of it, in the character of evidence, will, by an English judge, be much more apt to be noticed and held up to view, than in the opposite case.

Where the procedure is by information, there is no other difference in this respect, than what may be supposed to be produced by the inferiority of the maximum of punishment in this case, in comparison of the maximum of punishment applicable in cases prosecutable in the way of indictment. Seldom indeed, if ever, in the case of an information, will the occasion for any such remark on the part of the judge present itself.

Procedure, by attachment: evidence, affidavit evidence. Here, the evidence being all read of course, the judge makes whatever application of it he thinks fit. In the cases which we shall come to presently, in which the testimony is also presented to the judge in the form of ready-written evidence, it is not heard by the judge, except in so far as, for that purpose,

it is especially called for: and the question, for or against whom it shall be employed, resolves itself into the question, at whose instance it shall be read. The evidence being, according to his own theory, of the deceptitious kind, he is, according to that same theory, constantly deceived by it.

So much, for persons actually in the situation of defendants. But, of two persons having borne in the same criminal transaction exactly the same part, it may happen that one shall be put into that perilous situation, the other not. This accordingly is the case, as often as, by a reward, of which impunity forms the whole or a part, one of two delinquents is engaged to come forward against another, in the character of an extraneous witness.

Of this ground of suspicion and untrustworthiness, and of the use which English law scruples not to make of this most suspicious of all imaginable evidence, to this most dangerous of all imaginable purposes, notice was taken at the outset of this research.

But what is done in this way in the strongest of all cases, is done in the same way in all other cases of inferior strength and the like complexion. To dwell upon any of these inferior cases, would be an anticlimax. Such admissions are most perfectly consistent with that gigantic exception: all of them as completely repugnant to the general rule.

2. Civil cases: procedure, in the way of action at common law.

In this case, also, no question can be put to a defendant in behalf of any body; therefore not in behalf of a co-defendant.

3. Case, civil : law, equity law : procedure, by bill in equity.

On this ground, confusion is in all its glory : the powers of darkness have mustered all their force.

At common law, though testimony, in wholesale quantities, is pronounced deceptitious without knowing what it is,—still, take any given lot, it is either capable or incapable of being true : it is not capable and incapable at the same time.

The absurdities and injustice of common law were not enough for equity : she has made improvements : and in equity, the self-same statement concerning a matter of fact, the self-same proposition, is true and false at the same time : for or against A, it is true : for or against B or C, it is false. You who read this, were you sitting this day twelvemonth, at one o'clock P.M., in your study ? and in your answer, or your depositions, do you declare as much ? It is true, as against yourself ; it is false, false beyond all possibility of being true, as against me, a defendant along with you in the same cause.

Look to the origin of this difference, you will find it in the joint influence of several concurring causes :—in the practice of pursuing, on the occasion of such cause, two modes of collecting evidence, by *answer* and by *depositions*, agreeing in nothing but their unfitness for the purposes of truth and justice : in the confusion pervading the whole texture of the answer—claims and concessions confounded with affirmations and denials,—what a man says in the character of a party, with what he says in

the character of a witness,—propositions concerning the question of right, with propositions concerning the question of fact.

Wherever the object has been to relieve, and not to plunder the afflicted, to mitigate, and not to aggravate their sufferings; where the object has been to bring to light the truth, and the whole of the truth, for the purposes of justice; where such have been the objects, and the obtaining the simultaneous presence of all parties in court has been neither physically nor prudentially impracticable, the mode of collecting the evidence every where has been alike simple and effectual. Each party has been admitted to declare so much of what he knows, as promises to operate in favour of his own interest; each party, at the instance, at the interrogation, and thereby to the advantage, of every other:—the testimony of each party in his own behalf, allowed to be delivered, and received for what it was worth; the testimony of each party, when so delivered, allowed to be controverted by every other party, scrutinized by counter-interrogation, opposed by counter-evidence.

Such, accordingly, is the practice in the courts of conscience: such is the practice of the unlearned judges called justices of the peace, except in so far as, by exclusions forced upon them by their learned superiors, they have found themselves compelled to swerve from it. Such is even the practice on trials before juries; deduction made of the still more extensive exclusions, by which the budget of evidence is regularly defrauded of those parts of its contents which are likely to be most valuable, viz. the testimony of those individuals,

to whose perceptive faculties the facts belonging to the cause were most likely to have presented themselves.

In equity (as already observed), in one and the same cause, testimony is delivered in masses of two shapes, each different from the other, as well as from the only good one. One mass, in the form of what is called an *answer*, containing the ready-written testimony extracted from a defendant by the ready-written questions contained in the *bill*—an instrument drawn up by the plaintiff's law assistants, and without his perusal (or at least without his signature) exhibited in his own name, and in which those questions, the answers to which are expected to be true, are preceded by *charges*, a sort of testimony, which (as already observed) is allowed to be true or false at pleasure. In this shape, testimony is not called for at the hands of any persons that are not parties, nor, among parties, at the hands of any persons that are not defendants in the cause.

At common law, though the best evidence is so carefully weeded out, yet when once a lot of evidence has been permitted to come into existence, every use that is capable of being made is permitted to be made of it. Capable of being true with relation to any one person, it is allowed to be equally capable of being true with relation to every body else. Far otherwise is it with the sort of evidence extracted under the name of *answer*, by the process employed (as above) by the practitioner in a court of equity. The answer (the part of it in question) is good, as against me, the defendant whose answer it is. But is it good, ought it to be acted upon as good, as against

you, another defendant along with me in the same cause? To both questions the response must now be in the negative. Of what nature is the clause in question? An acknowledgment, having respect to the question of right; or an assertion, a deposition, having respect merely to the question of fact? If it be an acknowledgment of right, my right to give up a claim of my own is indubitable: but that I ought not to have any such right as to give up any claim of yours, is equally indisputable.

Is it a statement concerning a matter of fact? Even here, its title to be admitted, as against you, in the character of evidence, will appear to be bad, or at least questionable. Let the fact be even of the number of those, in relation to which, at the time at which it happened, I myself was, if I speak true, a principal witness; a fact which, if I am to be believed, I saw with my own eyes. That against myself, in relation to any claim that I have made, it may, and without any danger of injustice to my prejudice, be taken for true, is manifest enough: but as against you, and to the defeating of any claim of yours, has it an equal title to be taken for true? If any, certainly not an equal one: for there is this difference: you, in your situation, possess not that faculty of counter-interrogation, which, for defence against injustice, is in your situation necessary, but in mine not. By misconception, I may have been confessing that to be true, which in fact was not so. In the view of favouring the plaintiff at your expense, and at the expense of truth and justice, with or without his privity, I may have been confessing that to be true which you knew at the time to

be false. It ought not, therefore, to be taken for true as against you, without your having the faculty to controvert it, in the event of your regarding it as false: to controvert it, viz. by questions put to me in the way of counter-interrogation—of cross-examination. But questions in this way, the forms of the court do not, on the occasion in question, allow you to put to me. What they do allow and require is, that each of two defendants shall, in an instrument called his answer, make response to all such proper questions as the plaintiff in his bill shall have propounded to him: what they do not allow is, that either of two defendants shall, in this stage of the cause at least, put any question to the other.

In the first of these two cases, the exclusion is just in itself, would be just on every occasion, and in every court. But what is it that is here excluded? Not testimony, but unjust power: a power on my part to give away your rights.

In the other case, the exclusion may also be just; but if it be, it is so in no other than a hypothetical and relative sense, relation being had to the forms of the court, the forms actually in use. Setting aside that casual and adventitious and deplorable circumstance, the proper course is, not to exclude the one of two sets of evidence, but to admit the other: not to prevent my deposition from being taken into consideration as against you, but to allow you to put counter-questions to me, as you might do if I were not a party in the cause,—if the interrogations put to me, were put to me in the character of an extraneous witness.

The judge would not then be reduced, as

now, to the necessity of denying, explicitly or implicitly, a proposition which the weaker powers of Locke bowed down to as impregnable—it is impossible for the same thing to be and not to be. He would not have been reduced (as now he is every day) to declare, in deeds if not in words, that the same evidence is certainly true and certainly false. To the philosopher, by whom nothing was to be got by it, the task was an impossible one: but to the lawyer, into whose lap every day's profit is poured by every day's nonsense, neither this nor a greater absurdity (if the nature of things affords one) ever presents the smallest difficulty.

The other shape, in which, in the same courts, testimony is delivered, is that of a mass of *depositions*; a name extending elsewhere to all testimony, but confined, in English law jargon, to the designation of such testimony as is delivered in that particular shape. *Answer* is the name appropriated to the testimony delivered by a *defendant*, in reply to the questions propounded to him on the part of the plaintiff in the initiative instrument called the *bill*. *Depositions* is the name appropriated to the testimony delivered by a *witness*, in reply to the questions put to him *vivâ voce* in a closet, by a sort of judge or set of judges, whose authority is confined to the collection of testimony, without power to make use of it.

This mode is a mode appropriated to the collection of the testimony of persons spoken of under the name of *witnesses*. But in this same way, a defendant, every defendant, may be examined as a witness:—after a course of examination, the duration of which is always counted by months, not unfrequently by years,—re-

examined in another and much worse mode, under this other name.

Examined : but now, at whose instance, and for what purpose ? By the *bill*, at the instance of the plaintiff only ; against him the defendant only ; his testimony not being at that time obtainable at the instance of any body else, nor employable as against any body else, that is, as against any other defendant,—as we have been seeing, and for the relatively good reasons that we have seen. By the *interrogatories* (the name given to the questions now put to him by the examining judge or judges), he may be re-examined at the instance of the plaintiff or plaintiffs, as against any other defendant or defendants ; he may be examined, now for the first time, at the instance of any other defendant or defendants, as against the plaintiff or plaintiffs, or as against any third defendant or defendants.

Collected in this mode, his testimony may now be employed against others beside himself : employed, and with propriety ; but if with propriety, for what reasons, and thence on what conditions ? On condition that every person against whom it is employed, shall have the faculty of employing his exertions for the correction, completion, and (upon occasion) contradiction of it, by counter-interrogation and counter-evidence. In this mode,—is it at the instance of the plaintiff that he is examined ? This faculty the plaintiff possesses of course : for,—with relation to the self-serving testimony, which the defendant, as far as conscience and prudence will give him lea not fail to bring forward,—the inter formed by the plaintiff's agents, and

received and employed by the examining judge or judges, will have an effect analogous to that of the counter-interrogatories propounded to, and in the case of, an extraneous witness.

On this footing stands, it should seem, the law of reason; and on this same footing, for aught I know, may stand the actually established law.

But, to the faculty of administering to a defendant interrogatories from all those various quarters to all those various purposes, actual law adds a limitation, a saving clause: *saving all just exceptions*. These exceptions, self-styled just, what are they? Exceptions on the score of interest. Of what interest? This is more than I can undertake to answer, at least with any full assurance. A defendant without interest in the cause? How can that be? If he is without interest, this very exemption from interest is recognized as a circumstance, the effect of which is to preclude the plaintiff from dealing with him in the character of a defendant.

On the score of interest, a defendant not to be re-examined against himself, at the instance of the plaintiff? Why not? Good or bad, the interest did not exclude him from being examined against himself at the instance of the same person the first time; why should it a second?

On the score of interest, a defendant Primus not to be examined against himself, at the instance of defendant Secundus? Why not?

Applied to the present case, the import of the word *interest* is indistinct and obscure, viz. of a defendant as having an interest in the cases (viz. in the cases in which, on

the score of that interest, his testimony is excluded), implies that there are other cases in which he has no interest, viz. those cases (for such there are) in which his testimony is admitted. But a defendant—a party in the cause—and yet without interest in the cause? How can that be?

But it may happen (it may be said), and every now and then does happen, that a person is actually made defendant in a cause in which, whether he be thought or no to have an interest, he really has none; for in every cause it rests with the plaintiff to put upon the list of defendants any person and every person he thinks fit. True; but when cases of this description are laid out of the question, the difficulty remains notwithstanding. In this case (supposing the existence of it ascertained), the name of the defendant, the name which ought not to have been put upon the list, may be struck out of it. Those cases in which the defendant has clearly no interest to any sort of purpose, being set aside; there remain cases in which he has not, and at the same time has, an interest; has an interest, to the purpose of the continuance of his name on the list of defendants; has not an interest, to the purpose of his testimony's being regarded as inadmissible.

1. First, let it be proposed that he be examined at the instance of the plaintiff. It must then be either as against himself, or as against another defendant or defendants: for though two or more persons happen to find themselves together on that side of the cause, it may happen to them to have interests as opposite to each other, as that of any one of them to that of the plaintiff: inasmuch as it rests with the

plaintiff to put upon the list of defendants whatever persons he pleases.

Moreover, what may also happen is, that on the plaintiff's side of the cause there may be more persons than one; say two: that, as between those two plaintiffs, there may be, to some purpose or other, an opposition of interests, as between two defendants; for though no person can be upon the list of plaintiffs without his choice, yet so it may happen, that in consideration of a community of interests in some respects, two natural adversaries may enter into this sort of alliance.\*

As against the defendant himself, it is a conceivable case that the plaintiff may wish to examine the defendant; though a case not likely to be frequently exemplified. A defendant cannot come to be examined on behalf of the plaintiff, under the name of examination, (viz. by interrogatories put to him by a clerk in the examiner's office, or a master in chancery, or a set of commissioners appointed for the purpose), without having already been examined by the plaintiff himself, that is, by the law assistants of the plaintiff himself, without the name of examination, viz. in and by the instrument called the bill.

But, in general, the interrogation by bill, the examination that extracts the testimony in the shape of an instrument called an *answer*,—that

\* Four co-claimants on an insufficient fund: two put themselves together on the list of plaintiffs; the two others are put by them upon the list of defendants: between plaintiff and plaintiff there is here the same opposition of interest as between defendant and defendant, or between either defendant and either plaintiff.

examination, notwithstanding the time and opportunity it affords for concerting with an attorney the means of evasion and safe perjury, will, in general, be much more efficient than the examination performed through the medium of the judge or judges *ad hoc*, (the examining clerk, the master, or the commissioners): viz. the examination by which the testimony is produced in the shape of an instrument composed of *depositions*. More efficient? Why?

1. Because, by bill, the plaintiff, that is, his law assistants, with the help of exceptions to the answer, and amendments to the bill, keep on examining the defendant, till the plaintiff and his law assistants are satisfied with the completeness at least (if not with the correctness) of the answer; or at any rate till, in case of contestation, they are informed by the judge *ad hoc* that they have reason to be satisfied.
2. Because it is *probable* that, at least in the judgment of the plaintiff and his law assistants, better care will in this respect be taken of his interests by those assistants, than by the examining judge or judges; even where half of the number are (under the name of a commissioner or commissioners) nominated by these assistants themselves:—and *certain*, that, in the judgment not only of those assistants, but of every impartial person to whose consideration the case presents itself, better care will be taken by those same assistants, than (speaking of situations and not individuals) is likely to be taken by the judge *ad hoc*, if he be an examining clerk, or a master sitting in his closet; that is, in both cases, by a person who, in the nature of things, cannot have any other wish

or object, than either to get the business out of his hands as soon as possible, for the sake of his ease, or to keep it in them as long as possible, for the sake of the fees.

After having then, and on every point of the cause, carried the examination of his adversary the defendant to its utmost length, in the more efficient mode, (that is, in the mode which, in general, bids fairer for being efficient); is there any incident or consideration that naturally and reasonably may engage him to add to it, by another examination in the less efficient mode? Such incidents or considerations may not in every case be wanting. Despairing of being able to extract the truth, where the defendant, with an attorney at his elbow, has month after month for concerting the means of successful evasion and safe perjury; (the cause being, in point of locality, of that sort which, under the name of a *country* cause, affords examining judges, under the name of commissioners, that may be awake, instead of one that will be asleep); it may happen, that, in the person of a particular lawyer, in the character of commissioner, nominated by himself, the plaintiff may see an examiner, who (with the advantage of *vivâ voce* interrogation,—examination in a form which, calling for responses on the spot, cuts off the opportunity of mendacity-serving suggestion and premeditation) promises to his expectation a better chance for the effectual extraction of the desired truth, than could have been obtained in the mode of examination by bill, under the disadvantages above mentioned.

Another case that may happen is, that the defendant, after having given his answer, may go into some foreign territory; and a pair or a set of commissioners being to be sent into, or found in, that foreign territory, for the purpose of taking, at the instance of the defendant, the depositions of extraneous witnesses,—it may be deemed more convenient to take the benefit of that opportunity, and extract the ulterior testimony of the defendant through that same channel, than, after adding amendments to the bill, to aim at the extraction of the ulterior testimony in the shape of a further answer to the bill.

2. At any rate, the case just mentioned will be comparatively an uncommon case. But what cannot be an uncommon case is, that, as against one defendant, the plaintiff shall have need of the testimony of another defendant.

But has he not, in the way of bill, been examining them both, and examining them to the utmost? Yes; but (not to revert to the rare incidents and considerations above mentioned) against the making use of the testimony of one defendant against another, there is this objection. As against himself, defendant Primus has been sufficiently examined: for, to extract from him such facts and circumstances as make for his own advantage, no counter-interrogation can be necessary. But, as against defendant Secundus, defendant Primus has not been sufficiently examined: for, in order to extract from defendant Primus the whole of the facts and circumstances within his knowledge that make for the advantage of defendant Secu-

counter-interrogation may be necessary; and such counter-interrogation defendant Secundus has had no opportunity of administering.

But if, in behalf of the plaintiff, and as against defendant Secundus, defendant Primus has been examined in the character of a witness; if, *pro tanto*, his testimony has been extracted from him in the shape of *depositions*, as above explained;—he having been examined (as against defendant Secundus) in the character of a *witness*, defendant Secundus has had, or at least might have had, and ought to have had, the faculty of counter-interrogating him: of performing upon him that operation which, by an abuse of words, is called, in equity language, *cross-examination* (just as if it were the same operation that in common law procedure goes by that name); upon exactly the same plan, how imperfect soever, in which the operation so denominated is performed upon an extraneous witness.

Suppose two plaintiffs, and suppose either defendant (say, as before, defendant Primus) to be examined at the instance of plaintiff Primus as against plaintiff Secundus; the case may be much the same as the last. By the interrogatories put in the bill, and therefore put by both, as much of the facts and circumstances as make in favour of the one will have been extracted, as of those which make in favour of the other. True; if he to whom the truth, taken in its totality, is believed by him to be adverse, will consent to the interrogations necessary to the complete extraction of it: but such candour is too much every case expected. Suppose, then, of union in this respect,—the resource

will be, on the one hand, an examination performed on defendant Primus, on the footing of a witness, at the instance of plaintiff Primus, as against plaintiff Secundus; on the other hand, cross-examination of the same defendant-witness by plaintiff Secundus.

Now then, in regard to interest. Some interest, opposite to that of the plaintiff, defendant Primus must have, or be liable to have; else, even though the cause were what in equity law is called an *amicable* one, there could be no cause.\* But it may be, that,—though the two defendants have each of them an interest opposite to that of the plaintiff,—defendant Primus, as to some point in dispute between the plaintiff and defendant Secundus, has an interest of his own, opposite to that of defendant Secundus.

In this case, supposing the interest to be of that sort which in equity law ranks under that name,—and supposing the interest to be of that nature, that, by defendant Primus's deposing to

\* In equity, about half the number of causes that come before the court (at least in by far the busiest of the two great equity courts, the Court of Chancery) are amicable causes. At common law, there is scarce such a thing as an amicable cause. In equity, what is there that should be so much more prolific of amity than in common law? To friends, as well as foes, the younger sister is a still more merciless vampire than the elder. To the uninitiated, the problem will have all the air of an enigma. The solution will be to be found in the complicated nature of the greater part of the causes that come before a court of equity, (the original courts not having powers adequate to the treatment of complicated cases); so complicated, that, to save themselves from an infinite swarm of contingent suits, parties submit, by general consent, to the pressure of one actual one.

the prejudice of the interest of defendant Secundus, the interest of defendant Primus would be served;—the allowance of an objection to the admission of the testimony of defendant Primus, would, if made on the part of defendant Secundus, be consistent enough with the general principle.

But now, let it be at the instance of defendant Secundus, that the testimony of defendant Primus is called for: and let the interest of defendant Primus be such, that, by delivering the testimony so called for, his own interest would be disserved. Would an objection, on the score of interest, lie, in the mouth of defendant Primus, whose testimony is thus called for, to his own prejudice and against his own will?

With the general principle which gives to every man in the character of plaintiff the remedy by bill against every other man in the character of plaintiff, such objection would certainly not harmonize. For, among the distinguishing features of equity law, one of the most characteristic is, the affording to the plaintiff that power which the gentle hand of common law will not trust him with,—the power of extracting testimony in his favour from the bosom of his adversary.

But,—on the ground of another principle, acted upon at least, if not openly recognized, in equity law,—testimony adverse to the interest of a defendant ought not to be extracted at the instance of any co-defendant; at the instance of any person but a plaintiff. From a plaintiff, testimony is not allowed by equity law to be extracted in any shape, by or at the instance of a defendant: why should that of a defendant

be allowed to be thus extracted, by or at the instance of another defendant? Not from a plaintiff; because, were that allowed, the lawyers would be defrauded of the benefit of another cause, under the name of a cross cause. How should it, therefore, from a co-defendant? Would not a loss of the same nature be incurred? It would not be called a cross cause, indeed; but so long as it had the beneficial properties, names would not be worth thinking about.

The man of law is not consistent in any thing,—not even in rapacity. Where, at the instance of a defendant, the plaintiff is to be examined, they will not suffer it to be done without a cause on purpose: where, at the instance of a defendant, another defendant is to be examined, it may, perhaps, not have occurred to them to discover the same impediments.

## CHAPTER V.

### PROBABLE ORIGIN OF THE ABOVE EXCLUSIONARY RULES.

WE may now take our leave of the two Latin maxims, under which, when laid together, little less than the whole subject of the present Book may be comprehended.

1. *Nemo debet esse testis in propriâ causâ.*
2. *Nemo tenetur seipsum prodere.*

Of each of them we see that,

1. In the character of a general declarative proposition, undertaking to represent the actual state of the established law, it is notoriously false; it swerves most widely and notoriously from the truth.

2. That, when compared with the ends of justice and the dictates of utility in that behalf, it is, in so far as the fact declared by it is true, deplorably pernicious.

3. That, in delivering these rules (each of them) as true without exception, as Blackstone (for example) and so many others have done, they have uttered so many most palpable and notorious untruths; trusting,—for the reception of the propositions in the character of true propositions, and for their own escape from the disgrace generally and worthily attached to im-

probity in that disgraceful shape,—to the confusion in which the subject has been involved by their arts; and to that general and indefatigably cultivated ignorance, by which all who do not stand engaged by sinister interest to defend and propagate the misrepresentation, are debarred and disqualified from detecting it.\*

4. That, in favour of the rule pretending to oppose an effectual bar to self-disserving, under the name of self-betraying, testimony, the plea of humanity and tenderness is a mere pretence.

5. That, by the unhappy success with which this pretence has been played off, a most pernicious and widely spread correspondent superstition has been propagated and rooted in the public mind: insomuch that the people, having been generally duped by this imposture, have

\* Blackstone scruples not to assert, in express terms, that "the law of England . . . to avoid all temptations of perjury, lays it down as an *invariable* rule, that *nemo testis esse debet in propriâ causâ*."—Comm. iii. c. 23.

From this, than which a more rank misrepresentation never was committed to paper, let any one judge of the sort of information by which the minds of all the rising generation, and (in a word) of all who are not professed lawyers, are condemned to be poisoned, on a subject so important as that of law,—that rule of action, for the ignorance or misconception of which they are punishable every moment of their lives!

Thus much as to matter of fact: and note, that, as to matter of reason, it is on this notorious and wide-stretching falsehood, in conjunction with a real truth, viz. the "sufficiency of one witness," and he the sort of witness on whom an exclusion is so falsely represented as put by that rule,—that Blackstone grounds "the superior reasonableness of the law of England," as to the point in question: a superiority "acknowledged" (he gives us to understand) by the Roman law, and by the Scotch law as a branch of it. From the correctness of the picture in point of fact, here (as elsewhere) judge of the value of the praise.

been to such a degree deceived, as to regard with emotions of respect and gratitude the treachery by which their dearest interests have thus been sacrificed.

The truth of the above propositions is, it is presumed, tolerably well established. But, being thus mischievous, how came it to be established? By what considerations did it recommend itself to the minds of those by whom it has been established?

Interest, sinister interest, though in every country it will account so satisfactorily for the jurisprudential system, will not afford a separate account for every particular arrangement. In some instances, interest would really be neuter: in others, its indications might fail of being perceived: and wherever there is nothing to be got by thwarting public opinion, there is every thing to be saved by conforming to it.

The maxims, or general propositions, to which the most extensively applicable notions of jurisprudential law have been consigned, have owed their origin (when not to official and sinister interest) to some play of the affections or the imagination,—to some antipathy, sympathy, or caprice,—now and then to some view of utility, though almost always either too scanty or too wide. For the times when these maxims have been formed have been times of inexperience: times in which, for want of the requisite mass of experience, something was omitted, that required to be either added to the extent of the proposition or subtracted from it, ere it could be rendered commensurate to the exigency of the public interest on that ground.

Suppose the maxim to have had its root in

general utility. By the inordinate extent assumed by it, it would spread far beyond the root; including particular propositions in abundance, for which no root could be found either on the ground of utility or any other.

From the observation of the prevalence of self-regarding interest in every human bosom, (a principle upon which the individual and the species depend for their preservation), and of the undesirable influence which this principle was so apt to exercise upon human testimony; judges,—men delegated by the sovereign to dispose of the fate of others for whom they had no regard, sometimes by punishing their offences, sometimes by terminating their disputes,—formed to themselves, at an early period, this general proposition or maxim,—No man ought to be a witness in his own cause. It is susceptible of more senses than one: but in no sense would it ever have gained footing, had it not been for the indifference of those by whom it was applied, to its effect upon the feelings and interests of those to whose concerns it was applied. At bottom, in the breast of the judge by whom it was first broached, it could have had no more warrantable origin (whether he were or were not aware of it) than that of a desire to save his own time and trouble: for, be he who he may,—let his existence have occupied this or that portion of space and time,—what he could not but be conscious of, is, that in those instances in which, having a real interest in forming a right decision, he has felt a real anxiety to render it conformable to the truth of the case,—in a word, as often as, in the character of the father or master of a family, he has been

really solicitous to come at the truth; and the whole truth,—his conduct has never been such as this maxim prescribes. Pursue its application to the daily concerns of a family, and extend it to every family, you will find it incompatible with the existence of the species for any considerable length of time.

Whatever was the real reason,—the ostensible reason, the reason assigned to the public, is evident enough: the danger of deception; the danger lest the judgment of the judge should be misled, by testimony issuing from a source from which it was so liable to receive a direction deviating from the path of truth, the only path that leads to justice.

In this way the system of exclusion first introduced itself: attaching upon both parties in a cause, defendant as well as plaintiff; but in the first instance, and with greatest effect, upon the plaintiff, with whom every suit originates: upon the testimony of the plaintiff, considered as proffered by himself.

By favour of the weakness of the human mind, and the indistinctness and variability of language,—under the influence of supervening circumstances, — maxims (more especially maxims of jurisprudence) have received an extension, sometimes for the better, sometimes for the worse. By the maxim of English constitutional law, “the king can do no wrong,” nothing more was probably meant by the first framer of it, than to express the inviolability of that functionary: under favour of the ambiguity of the sense attached to the word *can*, some opposition lawyer of the day took occasion, by a happy

exertion of professional art, to graft upon that manifestation of power a declaration of impotence. Had lawyercraft never exerted itself to any worse purpose, the demand for these pages would never have existed.

From the observation of the perturbation that would naturally manifest itself in the countenance of a malefactor, when questioned on the subject of his misdeeds, some judge (actuated by misapplied compassion, or possibly by corrupt partiality, or society in guilt) took occasion to desist from the inquiry, grounding the dereliction, perhaps, on a new and strained interpretation of the maxim, No man ought to be a witness in his own cause. If the practice originally rested on that ground, it did not long remain there; since a fresh ground was made for it in the narrower and more apposite maxim, No man is bound to *criminate*—or (in language more rhetorical, more delusive, and therefore better adapted to the purpose) to *accuse*—himself.

Be this as it may; the system of exclusions came in this way to be extended to the testimony of a defendant, considered as called for, against his will, by his adversary the plaintiff, or by the judge.

The case thus far under consideration is a simple case: parties, at most but two; one on a side. In a suit of the criminal kind, instituted and carried on by the judge alone, without the intervention of any individual in the character of plaintiff, the number of the parties is even reduced to one.

In a case thus simple,—so far as exclusion

takes place,—there can be no room for doubt (as far as utility, or the semblance of it, is concerned) in which quarter, (that is, in which of the two maxims above mentioned), the prohibition originates. Is it by the party himself that the judge is called upon to receive his testimony? Fear of deception is the reason or the pretence, and the maxim is, No man ought to be a witness in his own cause. Is it by the adverse party that the judge is called upon to receive, and (as it is not in the nature of the case that it should be delivered willingly) to compel, the testimony? Fear of vexation is the reason or the pretence, and the maxim is, No man is bound—or, No man ought to be bound—to criminate, accuse, or (to slide it on to non-criminal cases) hurt, harm, injure, prejudice, himself.

But, for this long time, causes have from time to time appeared, of a more complicated texture: causes presenting, either on one side (and on either side), or even on both sides, parties in greater number: two, or a number indefinitely greater; but on this occasion, for exemplification, two will serve as well as twenty.

Suppose two of each side: what is to be done here? Apply the true reason, fear of deception, fear of vexation; you will now find cases in which they will not hold. No matter: the maxim is framed; it has attained its full growth: it has taken root of itself: it has become familiar to many a tongue, the head containing which saw no reason for it, nor ever thought it worth while to look for  
ne.

If this be so, on this ground then we must look for the origin of the practice in one or other of the two maxims; giving up the idea of looking for a reason, in the conduct of men to whom it never occurred to look for a reason — to look for any thing beyond the rule.

## PART VI.

### OF DISGUISED EXCLUSIONS.

#### CHAPTER I.

##### EXCLUSION OF EVIDENCE FOR WANT OF MULTIPLICITY.

##### SECT. I. — *Impropriety of exclusion on this ground.*

ON the several preceding grounds, the impropriety of the practice of excluding evidence has been rendered, I am inclined to think, sufficiently apparent: if so, on the present ground it must be much more palpable. In those cases, a cause of suspicion, and for the most part not an ill-grounded one, exists: and the error consists in employing exclusion, where watchfulness alone would have been the proper remedy. In the present instance, not so much as the slightest cause of suspicion is so much as fancied to exist; and yet a man is excluded without mercy. Excluded; and for what reason? For this, and this alone; that another man, having it in his power to give evidence pertinent to the case, is not to be found.

When suspicion is the ground of exclusion, the assumption is, that some men (*i. e.* all men

belonging to any of the suspected classes) are liars. Where want of multiplicity of evidence is the ground, the assumption is, that all men, all men without exception, are in this unhappy case. Take any two men, men of the most trustworthy complexion, as well in respect of individual character as in respect of station in life: take these two men; if a demand for their testimony happens to be presented by two different causes, they are both of them incorrigible liars, and neither of them ought to be heard: if, on the contrary, the like demand happens to be produced by one and the same cause, both of them ought to be heard, both these liars become good witnesses.

I have already had occasion to remark the incongruity of the law's taking upon itself to know more, and that in all cases, of the degree of credit due to evidence, than those who have the evidence before their eyes. Here the incongruity is still greater. In the case of the inadmissibility, the incapacitation, the judge or jury have not formed any opinion; because they have not been allowed to hear the grounds on which, and on which alone, an opinion could have been formed. In the case of the requisition of two witnesses, they have heard evidence, and such evidence as hath appeared satisfactory to their minds. The jury are satisfied; the judge is satisfied; the prosecutor is satisfied; the advisers of the crown are satisfied; every body who has had any opportunity of knowing any thing of the matter is satisfied: it is in the midst of all this satisfaction, that the legislator, who knows nothing about the matter, who has no possibility of knowing any thing

about the matter, chooses to remain unsatisfied. He chooses rather to suppose that a witness, whom he knows nothing about, is perjured, and a jury, a judge, a set of ministers, whom he knows as little about, deceived, than that one accused person, about whom he knows as little, and whom all these persons have concurred in believing guilty, was really so.

In speaking of the witness, I say *perjured*: and such accordingly is the supposition, and the only supposition, proceeded upon, in the case upon which this provision has been grounded: for, as to any particular danger which the witness may be supposed to be under, of having fallen into an involuntary mistake, there is nothing in any of the cases in which this regulation has been ever applied to warrant any such supposition, nor is the regulation ever supported on any such ground. Such then is the supposition, which the legislator chooses as the most probable; that one man, of whom he knows nothing, has made himself guilty of perjury,—a man whom all who have had the opportunity of knowing any thing about him, concur in believing innocent, —than that another man, whom all who have heard the case concur in believing guilty, was guilty, of another offence.

Thus much as to the impropriety and inconsistency of the rule. Next, as to its mischievousness: in comparison, as before, with the rules by which an exclusion is put upon witnesses of a particular sort. In the latter case, the witness or witnesses, on whose persons or in whose presence a malefactor is allowed to commit whatever crimes or other offences he

pleases, must, to give the malefactor the benefit of the license, be taken out of the suspected classes: in the present case, all individuals, without exception, are allowed to be pitched upon as victims or witnesses.

In a particular state of things, it is true, the mischief is greater in those cases than in this. In those cases, the number of witnesses in whose presence the crime or other offence is allowed to be committed, is without stint: on the present ground, the number of witnesses in whose presence it is lawful to commit the crime or other offence, extends not beyond one. But the facility given to delinquency by the removal of the restriction in respect to *number* in those cases, will scarcely be found to be equal to that which is afforded by the removal of all restrictions in respect of *quality* in the present case.

The accomplice, who is sufficient to enable a man to commit the crime, not being sufficient to produce, by the testimony of his lips, his conviction of and for such crime; each malefactor has thus a ticket of exemption to dispose of, in favour of any associate who may be disposed to join with him in any forbidden enterprize.

Thus much as to the effect of the exclusion, in causes of a penal nature. In regard to those of a non-penal complexion, the effect is still the same in kind, varying only in respect of the importance of the cause. Following the same rules, the task of giving it a separate exemplification under this separate head, may be dispensed with.

Such is the price paid for the security in question: viz. for the difference in point of

danger between the case where there are two witnesses in proof of guilt, and the case in which there is but one. Such is the price paid for this security; and after all, what is it worth? In the multitude of counsellors, says the proverb, there is safety; in the multitude of witnesses there may be some sort of safety, but nothing more; it is by weight, full as much as by tale, that witnesses are to be judged. *Pondere, non numero.* From numbers, (the particulars of the case out of the question) no just conclusion can be formed. Nothing can be weaker than the best security that can be derived from numbers. In many cases, a single witness, by the simplicity and clearness of his narrative, by the probability and consistency of the incidents he relates, by their agreement with other matters of fact too notorious to stand in need of testimony,—a single witness (especially if situation and character be taken into account) will be enough to stamp conviction on the most reluctant mind. In other instances, a cloud of witnesses, though all were to the same fact, will be found wanting in the balance. There is no man, conversant with the business of the bar, whose experience has not presented him with instances of dozens of witnesses opposed to each other in the same cause, line against line, and whose testimony has been of such a nature, that (howsoever it may have been in regard to mendacity) falsehood must have been on one side or the other. Naval trials are pregnant with instances in favour of this remark. According to Hume, on the subject of an engagement between Blake and Tromp, the unanimous testimony of the English captains

was contradicted by the unanimous testimony of the Dutch. Let any man read the trials of Keppel, Palliser, or Molloy, and then say whether security resides in numbers.

Let me not be mistaken. I do not mean to insinuate (it would be absurdity to insinuate) that the requisition of a second witness adds nothing to the security against perjury. No doubt but that, the greater the number of witnesses you require, the greater the security against perjury. All I contend for is, that that security, (be it greater or less), is not so necessary as that you should pay so great a price for it, as you do pay, and must pay, by the license you thereby grant to commit the crime in the presence and with the aid of any *one*.

"Reason," says Montesquieu,\* "requires two witnesses: because a witness who affirms, and a party accused who denies, make assertion against assertion, and it requires a third to turn the scale." This, by way of proof of the proposition immediately preceding: "The laws which cause a man to perish upon the deposition of a single witness, are fatal to liberty." This observation, short as it is, teems with errors.

1. The equality maintained turns upon this supposition, and no other, viz. that it is as unlikely that a person accused, being guilty, should aver himself to be innocent, as that, a party accused being innocent, an accuser should aver him to be guilty: in other words, that it is as likely a man should violate truth for the purpose of injuring an innocent person,

\* *Esprit des Loix*, liv. xi. c. 3.

as for the purpose of saving himself. Such is the supposition; but surely nothing can be more ill-grounded. The assertion of the witness amounts to something; the denial of the accused amounts to almost nothing: for he speaks under the terror of the law, which devotes him to certain punishment, in the event of his not denying.

2. Another error is, the supposing that any rational conclusion can be drawn from the mere circumstance of number, as between accusers and defendants, without taking into the account the particular circumstances of each case.\*

3. A third incongruity is, the confounding the case of witnesses with that of judges: for though witnesses are the persons he speaks of, the situation he places them in is that of judges.†

\* It is on the same ridiculous plea, that the testimony of a single witness has been determined in English law to be insufficient to ground a conviction for perjury: "because," we are told, "there would only be one oath against another." Irrefragable logic this, if all oaths be exactly of equal value, no matter what may be the character of the swearer, and to the action of what interests he may be exposed. It is on the same ground, that no decree can be made, in equity, on the oath of one witness, against the defendant's answer on oath. (See the following section.)—*Editor*.

† "Les loix qui font périr un homme sur la déposition d'un seul témoin, sont fatales à la liberté. La raison en exige deux, parce qu'un témoin qui affirme et un accusé qui nie, font un *partage*, et il faut un tiers pour le *vuider*."—Esp. des Loix, liv. xi. ch. 3.

I have made the best sense of the passage I could; but to make any, it was necessary to depart from the expression: for the expression is as confused as the opinion is ill-grounded.

*Voiding*, *emptying* a *division*, may be good French, and I suppose is, since it is Montesquieu's; but the image would be an incongruous and ill-constructed one in any language.

4. A fourth incongruity is, the making up the proposition and the demonstration in such a manner as not to fit one another in point of extent; in consequence of which want of just coincidence, nothing can be concluded. The case necessarily supposed, extends over no more than one of the two divisions into which the field of law is divided, viz. the criminal: and the reason is one that applies to civil as well as to criminal, though it appears not that Montesquieu was aware of the application.

The occasion to which his view seems to have been confined, the only occasion specified, is still narrower: that subdivision of the criminal law, which concerns offences that have been punished with the punishment of death. He might have been right in saying that laws which cause a man to perish upon the evidence of a single witness, are fatal to liberty; and yet not right, if he were to extend the same observation to cases in which death was not included in the punishment.

The expression *cause to perish—font périr*—would of itself be sufficient to ease the case of the weight of Montesquieu's authority, if authority were capable of weighing against reason. It alludes, to all appearance, to the practice of the Roman law, (the law under

The division, be it what it will, may be *terminated*: but how a division can be *emptied*, seems not very easy to conceive. The sort of division to which the phrase seems to bear allusion, is a division in the number of persons (judges for instance) having a *voice*, as the phrase is, meaning a *vote*, in any assembly invested with the form of a body corporate. This supposes the two assertions to stand on equal ground, like the opinions of two fellow judges; but the case, we have seen, is otherwise.

which he had been used to act) which makes conviction, and thence in capital cases death, a *necessary* consequence of the adverse deposition of two witnesses, — leaving no option to the judge.

Another circumstance that contributes to lighten the case of the weight of his authority, is, that the trials to which alone he had been used, and which alone he can be understood to have had in view, were trials in the judge's closet, without a jury, and on which cross-examination on the part of the accused was but imperfectly allowed, cross-examination by his counsel not allowed.

“Fatal to liberty?” What means *liberty*? What can be concluded from a proposition, one of the terms of which is so vague? What my own meaning is, I know; and I hope the reader knows it too. *Security* is the political blessing I have in view: security as against malefactors, on one hand; security as against the instruments of government, on the other. *Security*, in both these branches of it, is the benefit, the making due provision for which, in the case in question, is the object of these inquiries.

Where two witnesses have been required, the principle of determination is obvious enough: it has been the fear of giving birth to the conviction and punishment of innocent persons, if in each case the testimony of a single witness were held sufficient. Engrossed by the view of this danger, the attention has overlooked the so much greater danger on the other side.

For a single witness to produce by his testimony the conviction of an innocent person, it is not sufficient that false testimony on the side of conviction should have been given, it must

also have obtained credit with the judge; it must have produced in his mind a degree of persuasion, of sufficient strength for the purpose.

But, even among the vilest of malefactors, I have already had occasion to state, nothing is more uncommon than false testimony on the inculpativè side.

What the argument supposes is, that falsehood will prevail over truth: falsehood on the inculpativè side, over truth on the exculpativè.

The giving security to the innocent, is the object and final cause of this ill-considered scruple. Of what description of the innocent? Of those, and those alone, to whom, by false testimony, it might happen to be subjected to prosecution in a court of justice. On the other hand, those to whom, in consequence of the license granted by this same rule, it might happen, and (if the rule were universally known) could not but happen, to suffer the same or worse punishment at the hands of malefactors, are altogether overlooked. The innocent who scarcely present themselves by so much as scores or dozens, engross the whole attention, and pass for the whole world. The innocent who ought to have presented themselves by millions, are overlooked, and left out of the account.

It is to this ill-considered scruple, that the European nations have been indebted for the use of what is technically called *torture*; I mean in the most usual, and most exceptionable, application of it. The testimony of a single witness was not sufficient for the conviction of a defendant; but, in a case capitally punished, it was sufficient to warrant the applying torture to him, for the purpose of compelling a co

sion. Combined with this tremendous exercise of severity, what then was the effect of this false tenderness? In some cases, to produce, by dint of terror, a not very satisfactory confession: in other cases, to add to the regular punishment this accidental and unnecessary torment: in here and there an instance, to enable a guilty man, by patience under torment, to escape death, the ultimate punishment, in cases in which he would have been subjected to it under the English mode of procedure.

Under the best system of jurisprudence, it must happen now and then, though under the worst I believe it to be extremely rare, that a man completely innocent shall suffer as for a capital crime. In these deplorable cases, under the English system, which admits the grounding conviction on a single witness, the innocent victim will suffer the instantaneous and in a manner insensible infliction, and no more. Under the general law of the continent, wherever the application above spoken of under the name of torture was in use, the unhappy innocent would suffer death in whatever was its prescribed form, but with the previous addition of a state of torment more terrible than twenty deaths; unless, to free himself from it, he could succeed in inventing a credible, though false, narrative of guilt.

In the complication and intricacy of the discussions, of which a rule requiring a multiplicity of evidence will naturally (not to say necessarily) be pregnant:—in this, though comparatively a minor inconvenience, will be found a certain degree of force. Assuming that a

multiplicity of evidence is necessary, how is it that it must or may be composed? Say that there must be at least two witnesses; the difficulty is, in appearance at least, in a considerable degree obviated. Happy would it be for the interests of truth and justice, if the task of decision were attended with no other difficulty than that which attends the distinguishing of two individuals from one. But, where nature has made not an atom of difficulty, lawyers will make a mountain; where common sense would not find a speck to disturb the clearness of the case, science (I mean always jurisprudential science) will find means to raise a cloud. Two witnesses:—good; but to what fact? If one of them be to the principal fact, may not another be to an evidentiary fact,—his testimony constituting a *presumption*, in the language of the Romanists? Or, in fine, in consideration of the number, might not two presumptions (since there are two of them) suffice? Then comes in the question, though in language much less clear,—what, in all cases, and in the case in hand, is the principal fact; what an evidentiary fact.

Two witnesses again:—good. But in what shape must, or may, their evidence be exhibited? If one be a witness, examined as such, in the regular judicial mode, may not the place of the other be supplied by a lot of written evidence? especially if it be of a nature so superiorly trustworthy as those several species of written evidence which come under the head of *preappointed* evidence—a deed, an entry in a register, a judicial record of any kind. Or, again,—considering how great the

security for trustworthiness derivable from number,—may not one of the two pieces of evidence be of some one, or of any one, of the species of inferior evidence which have been brought together under the general denomination of *makeshift* evidence? Or,—if one such piece of inferior evidence, added to the regularly extracted testimony of an unexceptionable witness, be not sufficient,—may not the deficiency be supplied by two or three, or any and what greater number, of these inferior evidences, and of any and what sort or sorts? And, in short, if the number of these lighter and make-weight evidences be to a certain (and what) degree considerable, may not their abundance supersede altogether the necessity of a lot of heavier evidence?

A piece of written evidence again—say a conveyance bipartite, to which there is a grantor and a grantee, with or without one or more attesting witnesses. The evidence presented by this instrument, is it the evidence of one witness only, or of more? and how many more? All these difficulties, with abundance more; may be started (as some of them have been started) from the rule laying down the necessity of two witnesses: and in any, or at least in some, of these ways, may the number required have been made up, without any violence to common sense.

All these reasonable modes of splitting hairs have not yet sufficed to exercise the industry of lawyers. Not content with splitting hairs, they have proceeded to split men: out of one and the same man, they have made two witnesses.

When one man of law has laid down a foolish rule, an ill-considered and palpably pernicious rule; his successor, not to fall into the sin of the sons of Noah, and uncover a father's nakedness, makes his obeisance to the rule, throws a cloak over it, makes a leak in it, and, according to the measure of his dexterity, draws out the force and efficacy of it. We shall see presently, when we come to speak of the Roman law, to what a degree of refinement this policy has been pursued in the present instance.

Such, then, is the precept which excludes one witness for the want of other witnesses: impropriety, inconsistency, mischievousness, are the qualities which characterize it. Exceptions, however, in appearance at least, are not altogether wanting to the mischievousness of it.

1. One is the case where, from the nature of things, witnesses, principal witnesses, in numbers, cannot have been wanting. The scene, for example, in a spot where individuals cannot but have been collected in multitudes: a place of worship, a theatre, a market-place in market-time, a fair, a barrack, a dock-yard, a parade. In such a state of things, what harm, it may be asked, can result from the requisition of two, or even of three witnesses? I answer: Seldom any harm; but never any advantage.

The case in which the restriction would be proposed, will naturally be rather a penal than a non-penal one: quarrel, smuggling, embezzlement, sedition, riot: the side to which the restriction is applied will as naturally be that of the plaintiff; the object, real or pretended, will be the security of innocence; the preser-

vation of obnoxious innocence from the enterprizes of oppressive power. But if, on the supposition of guiltiness, the facility of finding witnesses qualified to make proof of the affirmative is so great; on the other hand, on the supposition of non-guiltiness, the facility of finding witnesses qualified to make proof of the negative, will at least be equally so. The consequence is,—granting the exclusion to be harmless, it will still be useless.

Not that it always will be harmless; the publicity of the place does not necessarily suppose the publicity of the act. A secret blow or wound may be given, a secret word of insult or conspiracy whispered, a secret act of pilfering committed or attempted, as well in the most crowded apartment as in the wildest desert: in some instances, the closeness and bustle of the throng will even be favourable to secrecy.

Another observation. The multiplicity of *percipient* witnesses, how great soever, is not always sufficient to secure so much as a single *deposing* witness: still less any greater number. Let ten persons have seen what passed, if they be all of them ill disposed to the plaintiff's side, or well disposed to that of the defendant, it may happen that none shall have given spontaneous information to the plaintiff; none but what, on being questioned with a view to prosecution, and before the commencement of prosecution, and consequently without those securities for veracity which are afforded by examination *coram judice*, may have given an account purposely false; although the same persons, if examined upon oath, and under the

control of the concomitant securities, would not go the length of seeking to accomplish their wishes by perjurious evidence.

2. Another seeming exception may be composed of the cases in which it may appear that the mischief of the offence depends (if not altogether, at least in a considerable degree) on the number of the persons present at the commission of it. Such are those in which the mischief consists in the wound given to the psychological sensibilities of the persons present, by acts or discourses offensive to their affections or their taste: acts or discourses savouring of indecency: discourses expressive of contempt for any of the objects of their worship or respect: for the established religion, for the established government, and, in particular, for the person of the chief magistrate, where there is one, especially if invested with the rank of royalty. The greater the number of the persons present on any such occasion, the greater the danger of mischief, in each of two opposite ways. If, in the company in question, there be any to whom the obnoxious exhibition, or the discourse, is offensive, the mischief of the act respects the present pain of which it is productive. If there be any by whom it is regarded with complacency, it becomes mischievous on another account: on account of the danger lest, by the spread of the same obnoxious practice or sentiment, the shock given to men's feelings may become more and more extensive.

By requiring that, in support of a prosecution of this sort, there shall be two witnesses at least, or three witnesses at least, provision (it may appear) is made, that, for the act to be

converted into a punishable offence, there shall have been present at the commission of it at least that number of persons.

That, among the effects of an arrangement of this sort, may occasionally be found that of operating as a check to over-industrious antipathies, and that check a salutary one, is not to be denied. But that this is the most proper mode of applying such a check, cannot be admitted. If a regard for the liberty of private intercourse forbids the treating the act on the footing of an offence, unless a certain number of persons be present at the commission of it, the direct and proper mode is to say so at once: to word the condition in such a manner as to apply it, not to the number of persons appearing in the character of *deposing* witnesses, but to the number of persons existing at the time, in the character of *percipient* witnesses.

A consideration which there has already been occasion to bring to view, is, that amidst any abundance of persons present in the character of percipient witnesses, there may be a scarcity, or even an absolute want, of deposing witnesses: the two characters are therefore, by no means, either identical or convertible. Another consideration is, that, unless the objection be obviated by a special provision, the function of a deposing witness may be performed by a person who was not a percipient witness,—who was not present at the commission of the offence: as where the evidence stands in the relation of a discourse of the confessorial kind, held by the party accused; or where, in any other shape, it wears the character of circumstantial evidence.

From an institution improper in the main, useful results may flow by accident. That, in this way, occasional good may result from the species of exclusion here contended against, is not to be denied. In this way, the mischievousness of it may now and then receive occasional palliation. Thus much may be said, but this is all that ever can be said, in favour of it.

In this way, as in every other, the effect of an institution putting exclusion upon evidence upon the plaintiff's side, is, to enervate the substantive law to which it applies. So far as the substantive law is bad, so far (according to an observation we found occasion to make in a former instance) any such debilitating institution, in the line of adjective law, may be of service. So far, therefore, as it may be possible to confine the drag, the adjective incumbrance, to a perniciously active law, so far that which is in general a nuisance may have a particular use. Amidst the pulling and hauling so frequently exemplified in legislative bodies, it not unfrequently happens, that a party which has not power enough to stop the wheel altogether, finds means in this way to attach a drag to it. But the very circumstance that constitutes the utility of the institution in these particular cases, is its mischievousness in all others. The proper remedy is, not the establishment of the bad adjective law, but the abolition of the bad substantive law.

In the case of capital punishment, but in that alone, the Mosaic law requires two witnesses. From that source, perhaps, was derived the European rule: I should look upon this provision as a great improvement, if introduced in

England. Why? Not as deeming the requisition of two witnesses a proper one, but as deeming the punishment of death an improper punishment. To authorize such punishment, if three witnesses were made requisite, so much the better: if three dozen, better still.

But, from the necessity of two witnesses, to authorize the infliction of death in the character of a punishment, what follows? Not that, in case of one witness, and but one, acquittal should take place; but that some other punishment should take place, different from, and thereby inferior to, capital.

SECT. II.—*Aberrations of Roman and English law in this respect.*

IN the Roman law, two witnesses are pronounced indispensable. In the penal branch (the higher part at least), what followed? Torture. By fewer than two witnesses, a man was not to be consigned to death; but by a single witness he might at all times be consigned to worse than death. If, then, being guilty, he had it in his power to relate and circumstantiate a guilty act, at any time, if he thought fit, he might, at the price of future suffering, release himself from present torments. But if, not being guilty, and in consequence not having it in his power to circumstantiate the guilty act, he had it not in his power to release himself at that price, he was to suffer on: perishing or not perishing, under or in consequence of the infliction, as it might happen.

Upon the face of it, and probably enough in the intention of the framers, the object of

this institution was the protection of innocence. The protection of guilt, and the aggravation of the pressure upon innocence, was the real fruit of it.

In the non-penal branch, the experienced mischievousness of the rule forced men upon another shift, of which, if the mischievousness be not so serious, the absurdity is more glaring. I mean the contrivance already hinted at,—the operation of splitting one man into two witnesses. Proposing to himself to make a customer, or non-customer, pay for what he has had, or not had,—a shopkeeper makes, in his own books, an entry of the delivery of the goods accordingly, and by this entry he makes himself one witness. A suit is then instituted by himself, against the supposed customer, for the value of the goods: he now takes an oath in a prescribed form, swearing to the justness of the supposed debt, and by this oath he coins himself into a second witness, the second witness which the law requires. By the same rule, if three had been the requisite complement of witnesses, two such oaths might have completed it; if four witnesses, three oaths; and so on. With a splitting-mill of such power at his command, a man need never be at a loss for witnesses.

In every cause, the plaintiff, to gain it, must make full proof (*probatio plena*). The tradesman's books make half a full proof (*probatio semiplena*): his oath, as above (his *suppletory oath*, it is called), makes the other half.\* Sixteen paragraphs before, in the book of authority,

\* Heinecc. iv. 134.

from which, for reference sake, the instance has been taken, the reader has been assured (and that without exception, and in the most pointed terms), that a half-full proof, though composed of the testimony, regularly extracted, of a disinterested witness, of the most illustrious and consequently trustworthy class, goes absolutely for nothing.\*

From this inexhaustible source of inconsistency and injustice, the English law, the jurisprudential branch of it at least, is free. I say the jurisprudential part: for, on this and that occasion, the legislator has interposed, and required two witnesses.

From the first of Edward VI. to the thirty-first of the late reign inclusive, seventy-four exemplifications of this unwarranted and perfectly inconsistent scrupulosity may be counted.

If any thing like principle or reason for the distinction were looked for in this catalogue, the search would be in vain. If, in this or that instance, a seeming reason, of the nature of those above displayed and refuted, glimmers through the cloud, at the next step the light deserts us altogether. In several instances, cases naturally more sparing of evidence than any others present themselves as having been selected for the requisition of this superfluity of evidence; as if for the express purpose

\* "*Juris interpretes probationem in plenam et minus plenam, et hanc iterum in semiplenâ majorem et semiplenâ minorem, dispescunt. Quamvis verius sit ex juris Romani principiis, unius testimonium planè non admittendum esse, licet præclaro curiæ honore præfulgeat: adeoque non meliorem esse conditionem ejus qui semiplenè, quàm ejus qui nihil, probavit.*"—*Heinecc.* iv. 118.

of exposing the substantive law to derision. Poaching, smuggling, gaming, nocturnal destruction, forgery, bribery, and extortion, are of the number. Bribery has, in this way, received the protection of the law on three several occasions: and on these occasions so effectually has the cankerworm eaten out the substance of the law, that it is difficult to say by what means the corrupter or the corrupted, the giver or taker of the bribe, can possibly be convicted, unless they were to join in laying in a stock of evidence for the purpose, ambitious of martyrdom in so honourable a cause.

Consistency, or any steadier principle than the passion of the individual and the moment, not being to be found in any part of the existing chaos; it were in vain to look for any such treasures amidst the scraps of legislation tacked together by so casual a tie. The sphinx would have broken her neck a hundred times over, before she had discovered why, for convicting a man of abusing, insulting, or obstructing a set of half-yearly officers, composing what is called a jury of annoyance,\* it should require double the quantity of evidence in Westminster, to what it would require on the inside of Temple Bar, or on the other side of the Thames. This for one: but the same narrowness and the same shallowness may be seen in all the other seventy-three instances.

By the single testimony of a self-acknowledged malefactor, of a character stained with the blackest infamy, swearing to save his life, and put money into his pocket, any man, with-

\* 29 Geo. III. c. 25. § 10, 12.

out exception, may be consigned to capital punishment. And with this case every day repeating itself before his eyes, shall a legislator, when a fresh patch comes to be put upon the motley tissue, stand up in his place and say, Nay, but upon this occasion justice and humanity call upon us to require two witnesses?

Among the cases in which, under English law, two witnesses are required to support a conviction, is that of high treason.

If, in some ancient book of travels in some such country as Monomotapa, or among the Amazons or Topinambous, we were to read of a people who were governed by a king, but among whom it was lawful for any man at any time to kill the king, provided no more than one person were privy to the fact, or in the company of any number of persons, being persons of certain descriptions,—we should be apt to reject it at once as fabulous, and fabulous to a degree of extravagance. Were a poet to come out with a play, in which the plot turned upon the supposition of such a law, we should turn aside from it, as grounded on an improbability too glaring even for fable. We should rank it with the story of that monarchy which held out the highest of rewards for the successive assassination of every monarch that sat upon the throne, by bestowing the throne itself upon the assassin for his reward. Human blindness has not yet, since the Saxon times, gone so far as to offer a secure reward, together with impunity, for the assassination of the sovereign, in this enlightened country. It goes no further than to offer impunity: impunity indeed only

in certain cases, but those such as are constantly liable to occur.

It might be worth the consideration of the gentlemen of the long robe (and no incompetent subject for the exercise of their ingenuity), whether the king be a man: and whether George Gwolph, commonly called George the Fourth, may not have as good a claim to the protection of the law against assassination, as John Brown or Thomas Smith: and whether, accordingly, if any partaker or abettor of any pop-gun plot, past or future, successful or unsuccessful, were to be arraigned for shooting, or shooting at, the said George Gwolph, the court would be obliged to take notice that the said George Gwolph happens to be king of Great Britain, for the purpose of affording impunity to his murderers, or intended murderers.

It seems, for this purpose, high time to know whether the king be a man or not: and were it to be determined, by the twelve judges for example, in the negative, it might then be not amiss to inquire, whether it might not be advisable to strip him of a part of his royalty,—of so much of his royalty as excludes him from the protection given to all other men, for the purpose of declaring, that neither shooting him, nor shooting at him, should be punishable.

Picking a pocket of a handkerchief, value one shilling, is capital felony; its being the king's pocket does not make it treason: for picking the king's pocket of his handkerchief, a man might be hanged on the testimony of a single witness: shooting the king being treason, a man may shoot the king in the presence of any body he pleases, and not a hair of

the murderer's head can be touched for it. Blessed laws! under which it is as safe again, to shoot the king as to pick his pocket!\*

So long as this regulation subsists, a law which, taking up any of those offences against personal security which in the case of an individual are capital felonies, should, in the case of its being levelled against the person of the sovereign, declare it to be high treason, would, instead of adding any thing to the personal security of the sovereign, diminish it by at least one half; leave it, in respect of such offences, but half as great as it was before.† This consequence will not be intelligible to a legal understanding. To such an understanding it will be impossible ever to comprehend how so high-sounding a word as *treason*, especially with the word *high* before it, should fail of giving a better security than any that can be given by so ordinary a word as *felony*. I would never allow myself to entertain a hope of rendering the proposition intelligible to a lord chief justice or an attorney-general; but I should have no doubt of its being understood, at the first word, by the man who blacks their shoes.

\* This singular rule of evidence is now no longer in force as regards any direct attempt against the person of the king, but it still subsists as regards any other kind of treason.—*Editor.*

† In the description of the mode of execution there is indeed some difference, but only a nominal one. In *felony*, the convict, after being hanged till he is dead, is buried in that state: in *treason*, after being hanged till he is insensible, his bowels may be taken out, and his body divided into quarters, and then either buried or not buried. What would otherwise be done completely by the worms, or by the worms

But this provision forms part of a statute of King William; and that statute is an excellent statute: it forms a link, and a most valuable one, of the chain of securities framed for the subject in the course of that illustrious reign. This is the grand argument; and here stands the stronghold of prejudice, declamation, and common-place. Were I to be forced to say whether jet and snow are black, and yes or no were the only answer that would be admitted, I should find myself a little puzzled. Were I asked, in like manner, whether this be a good statute, or no, I should be puzzled in the same way: if I were obliged to give an answer, I

and a surgeon together, is done partially by the executioner. The words of the judgment are, that he be cut down while he is yet alive, and his bowels taken out, and *burnt before his face*. But when a man neither feels nor sees any thing,—what becomes of his bowels, and whether, if burnt, they are burnt behind his back or before his face, is not that sort of difference by which human conduct can be governed. That a man about whose neck the fatal rope has been tied, ceases to feel as soon as the weight of his body has been applied to the tightening of the rope, has been ascertained over and over again by the report of those, who, after a suspension, voluntary on their part, or involuntary, have, in a great multitude of instances, been recovered into life.

The bodies of those who die a natural death are frequently laid open, to satisfy the affectionate curiosity of relatives, or the more useful curiosity of the medical attendant. The bowels of kings themselves have been taken out to be embalmed: the bowels of traitors are taken out and burnt; that is, disposed of in a manner that was preferred to embalming in the instance of Roman emperors. If drawn to execution in a carriage, the felon is drawn in a carriage with wheels, the traitor in a carriage without wheels. No one can seriously suppose, that variations so frivolous and minute can add any thing to the security. No man can seriously suppose, that he who would be content to risk the punishment of a felon, would not equally risk the punishment of a traitor, as here described.

suppose it would be in the affirmative: but were the benefit of a distinction to be allowed me, I would most certainly pick this clause out of the statute; and an answer in favour of the remainder would not lie heavy upon my conscience. This clause, whatever may be thought of it by itself (if ever it has been thought of by itself), it is natural it should derive no small degree of favour from the good company in which it has been always found. How far it is entitled to any such favour by its own merits, has been pretty fully seen.

The statute is indeed a statute of King William: it was passed by King William: but as to this clause, at least with equal truth may it be said to have been passed *against* as *by* that useful and meritorious, but ungracious and ill-beloved, king. It was forced upon him by the party who, at that very time, were plotting, all of them his expulsion, and many of them his death. It was accordingly so constructed, with the benefit of this clause, that, besides the protection it afforded to the innocent, it afforded most ample protection to whoever might have numbered themselves, or might be disposed to number themselves, among the guilty. Looking at this clause of it, before I had adverted to the history of the time, I wanted no farther proof to say to myself, the design of it seems to be "to make men as safe in all treasonable conspiracies and practices as possible." Turning afterwards, for curiosity's sake, to Bishop Burnet's History of his Own Time, I found the same thing said already in the same words. So said Bishop Burnet: but little did the good bishop know, though we know now, half the

ground there was for saying so. No wonder the parliament should have been overpowered by disaffection, when the cabinet was governed by, if not exclusively composed of, traitors. No wonder that the necessity of two witnesses to conviction was contended for with so much anxiety, was put at the head of this protecting statute: a minister might thus correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe. Turn to the papers which Macpherson has brought to light; read over the names of the Marlboroughs, the Russels, the Newcastles, the Leeds's, the Normanbys, the Shrewsburys, the Godolphins, the Sunderlands, the Abingdons, and I know not whom besides: we shall see how far this license was from lying unemployed. As to the other provisions, then, all of them have their merit, some of them were no more than the removal of barefaced injustice; but as to this, it was specially levelled, not against false accusations, but against true ones.

The consequences are instructive: no where can reasonings receive a stronger confirmation from events. Scarce had the legislature passed the act, when the incongruity of this part of it stared them in the face. A conspiracy broke out,—a conspiracy, of the reality of which no one ever entertained a doubt,—a conspiracy confessed afterwards by the conspirators: and for the proof of this conspiracy, at the trial, no more than one witness could be found. I speak of Sir John Fenwick's case. Two witnesses the case *had* happened to afford; but one of them (Goodman), between the finding of

bill and what would have been the period of the trial, the friends of the defendant got hold of, bought off, and sent out of the way. What was to be done? The case was flagrant: the nation called for justice. An act of attainder was passed, grounded on that same insufficient evidence. Proscription was resorted to, because justice had been made impracticable. The flaw that had been made, was to be covered; but the covering was a cobweb of the moment, which left the flaw just as it was, for the benefit of future traitors.

The mischief was permanent; we are saddled with it to this day: the remedy was momentary: nor, at the moment for which it served, was there an argument for it that did not prove the incongruity of the law which had created the demand for it.

Under rules of law, which, had they been calculated for the express purpose of the destruction of society, could scarce have been better adapted to it than they are, how is it that society is kept together? The question presents itself at every page, and the answer is still the same:—By the unintelligibility and inaccessibility of those rules,—by the darkness of the chaos of which they form a part. It is on the being known, that what there is good in the system of law depends for its effect: it is by the being unknown, that the mischief of what there is bad in that system is diminished.

One abuse finds its corrective, its palliative at least, in another; each particular abuse in one enormous universal one: each weakness, not in a corroborative application, but in another weakness; each particular negligence, not

in particular vigilance, but in general negligence.

If society hangs together in the manner which we see, it is not so much by what the law does, as by the expectation of what it will do, grounded on the conception of what it ought to do. Fascinated by a variety of prejudices, pernicious in one point of view, salutary in another,—a man, from conceiving that the law ought to do so and so, concludes that so in each individual case it will do. The affirmative conclusion is most favourable to the tranquillity of society; the negative would probably be found in most cases the one most conformable to the truth.

In the case of the particular exclusion now under consideration, I will venture to suggest a few possible modes of remedying the mischief. If these remedies should appear to have little to recommend them in the eye of reason and common sense, it will be only because they are cut as closely as possible to the rich pattern of the common law.

One expedient might be, the having in every court of penal jurisdiction a wooden evidence, or man of straw, under some such name as that of the common witness, or common vouchee, whose office it should be to vouch for the truth of every deposition given by a single witness, in the event of his not having the support of a special evidence of his own kind. If, as in the case of a common recovery, indemnification may be given where there is no property, why may not evidence as well be given where there is no knowledge? The testimony of a dumb witness is as good as that of a speaking one; and there needs not the skill of a Kempel, a

Droz, or a Merlin, to make a wooden or a straw witness capable of kissing the book, and giving the requisite tokens of affirmation. If extraordinary powers of digestion should be thought requisite for the oath, Merlin has an anthropomorphic stone-eater ready made.

If the expense of the attesting puppet should be grudged, the part of the puppet might be enacted by a living person, such as the crier of the court: the same respectable person who for so many centuries has supported the character of the common vouchee or indemnificator general, in the Common Pleas, so much to the satisfaction of the best judges.

It might be objected to this expedient on a hasty view, that this, on the part of a living witness, would be perjury: and that it would be an indecent mockery, a gross profanation, and a practice subversive of the foundations of justice, were a judge thus openly to lend his countenance to perjury. But it seems difficult to say how, if it be proper for a judge to countenance perjury in a juror, it should be otherwise than proper to encourage it in a witness; or how the perjury should have less of *piety* in it in the one case than in the other. If in the instance of the juror it is *in favorem vitæ*, in the instance of the witness it is *in favorem justitiæ*, which is worth many lives.

Another mode might be, the passing a statute for the purpose of declaring that in all cases where two witnesses are or shall have been required by law, one witness shall be deemed, adjudged, construed, and taken to be two witnesses. This mode would be perfectly of a piece with the established practice, the object

of which is to add knot after knot to the entanglement, avoiding with religious care the solution or removal of any part of the existing mass.

Another mode might be, to produce the same effect by practice or rule of court, as often as occasion called for it: which would save the three or four hundred pounds which it costs the country every time to make a statute. This, it might be said, (since there are those who will say any thing), would be a barefaced usurpation,—a direct attack on the part of the judicial power on the legislative,—an act tending to the subversion of private and public security, by planting uncertainty in the very fountain of legal certainty, and destroying all confidence on the part of the subject in the dispensations and threatenings of the law. If this were to be allowed, judges (it might be said), whose special duty and cardinal virtue is obedience, would thus be suffered to erect themselves, not into a fourth estate, but into a separate estate, independent of and paramount to the three others. I answer, that this has been done in effect, as often as, by exclusion of witnesses, or *ex post facto* invalidation of legal acts, conditions have been annexed to conviction, which have nothing to do with innocence, and which have not been annexed by the legislature.

Thus much in a general point of view. But the practice of the King's Bench, the first criminal court of ordinary jurisdiction in this part of the united kingdom, affords (as has been already seen) a special precedent, which, if not exactly in point, seems as near to the being so

as can easily be conceived. Divers statutes give in divers cases treble costs. These treble costs, the court of King's Bench in all these cases refuses to give: giving, in the room of them, rather more than half what the legislature has ordered to be given.\* There would be no greater stretch of authority in requiring but half the number of witnesses that the legislature orders to be required, than in giving but half the money under the name of costs that the legislature orders to be given. Nothing of misconstruction here—nothing of misapprehension: that which is done here, cannot have been done with other than open eyes. Legal learning, how consummate soever, can never have fairly unlearned a man the difference between three and one and a half, between two and one. He who continues to know the difference between his right hand and his left, must continue to know that right and left together are more than either right or left alone.

In the common-law branch of jurisprudential law, we have seen the arrangements on this head conformable to reason and utility: what defalcations have been made from the general rule, we have seen made by the legislature, in consequence of those conflicts and compromises to which a mixt sovereignty is more particularly exposed.

In the equity branch of jurisprudential law, the principle of Roman law, which requires two witnesses,—which excludes every witness

\* See Book VIII. TECHNICAL SYSTEM, Chap. 25. *Contempt manifested to the authority of the legislature.*

without distinction, who comes not with another witness in his hand,—predominates.

The defendant, a party in the cause, is but one witness, just as much so as an extraneous witness. At the same time, though the common law in its wisdom refuses to hear this evidence,—in equity law, adopting in this instance the decision of common sense, in probative force it is looked upon as superior to that of a host of extraneous witnesses. To the general rule which requires two witnesses, the admission thus established will be an exception or not, according to the interpretation put upon the word *witness*. If (being co-extensive in its import with the words to *depose*, *deposition*, to *examine*, *examination*, and so many others) it be understood to include the *party* when performing the function of a witness, the admission operates then as an exception to the rule: if the word *witness* is understood to be confined in its application to the designation of *extraneous* witnesses, the admission given to the testimony of a party has nothing to do with the rule. For simplicity's sake, let us conceive the rule as having no application to parties,—as having no testimony in view but that of extraneous witnesses.

Taking the rule, then, in this sense, equity law does not adopt it in all its rigour. The defendant's testimony (such as it is) the plaintiff never can be without: for the suit can no otherwise be instituted than by the instrument called a bill, of which the interrogatory matter by which the defendant's testimony is called for, and to which he is bound to make answer, forms an indispensable part. But in regard to

this or that fact (facts as material as any to the cause), what may easily happen, and what continually does happen, is, that the defendant knows nothing about the matter. If, then, knowing nothing about the matter, he declares as much, the testimony of a single extraneous witness speaking to that fact, is, with regard to that fact, sufficient evidence.

But if, among the facts inquired of by the plaintiff, there be any one, the establishment of which is necessary to form a ground for a decree operating in any respect in the plaintiff's favour; and if, in relation to this fact, the defendant delivers his testimony, denying the fact,—an extraneous witness, and but one, affirming it; here, the law requiring two witnesses has always been conformed to: and in this case, as in the other cases where two witnesses are required, the testimony of a single witness goes for nothing.

English equity law having been, in its first concoction, Roman law imported from the continent; the first equity judge to whom it was proposed to ground a decree in favour of the plaintiff upon the testimony of a single extraneous witness, contradicted by that of the defendant, would (how thoroughly soever persuaded of the truth of the witness's testimony, of the falsehood of that of the defendant's) have acted, according to Roman law, illegally, had he made a decree on the ground of the true evidence. If a single testimony, though uncontradicted, is insufficient, still more must it be so if contradicted.

So far as precedents, judicial precedents, being contrary to truth and justice, are not

contradicted by other precedents, it is not lawful (at any rate it is not necessary) for a judge to decree according to truth and justice; it is incumbent, or at any rate it is lawful, for him to decree according to precedents. The equity judge who, at this time of day, refuses to pay any regard to the testimony of an extraneous witness whom he believes to be trustworthy, because contradicted by that of a defendant whom he believes to be perjured,—this Anglo-Roman judge probably thinks nothing at all about the original Roman law: all he has to do, is to think of the English precedents that have been grounded on it.

If, thinking nothing of the precedents in his own law, or of the foreign law on which they were founded, he were to consider himself as an English judge; in putting any such exclusion upon the testimony of the extraneous witness, his decision would be as inconsistent with the decisions of his predecessors, as well as with the interests of truth and justice, as any of their decisions have been, when compared with that same standard.

Here are two conflicting testimonies (one might say to him): the one liable to no objection; the other, that against which, in order the more effectually to come at the truth, your predecessors, in quality of English judges, have thought it incumbent to shut their ears. To the testimony clear of all objection, you pay no regard. The sort of testimony which (according to the rule you are bound to pursue) is unworthy of all regard, — it is by that you govern yourself.

On the present head (not to speak of others),

the practice of English equity is reconcilable neither to Roman law, nor to English law, nor to common sense. Not to Roman law; since, where the defendant is silent, it decrees in favour of the plaintiff, upon the testimony of a single witness.\* Not to English law; since, where the defendant contradicts the witness, it counts testimonies without weighing them. Not to common sense; for the same reason, and because it gives the turn of the scale to that one of the two sorts of testimony, which, according to the principles of human nature, has least weight in it.

The ground on which this arrangement is placed by the account given of it in the books, is curious enough: here is oath against oath; therefore nothing is to be done.† The judge who should allege this contrariety as a reason for doing nothing, would recognize himself unfit for his office.

*Injured suitor.* To weigh testimony against testimony in a jury-box, is the business, the every day's business, of the same sort of man whose business it is, when behind a counter, to weigh lead or brass against bread or candles. What, then? Is the task too hard for you? Do you sink under it? Such imbecility, is it the fruit of all your science? Sue, then, for a place in the jury-box; and learn your business from bakers and tallow-chandlers.

The task the juryman has to perform, every day to perform, is the deciding between the

\* 3 Atkyns, 649.

† 3 Atkyns, 649, and abundance of authorities there cited. Lord Hardwicke several times.

testimonies of two witnesses, both of them equally unobjectionable. What are the two between which you profess yourself unable to decide? One of them worth as much as any body's; another (at least if your rules are good for any thing) worth nothing.

*Lord Chancellor.* It is not but that, if I was at liberty, I could weigh testimony against testimony as well as any tallow-chandler; but the mode of inquiry which I am bound and content to conform to, does not allow me to weigh evidence. Where truth is at all doubtful, equity is altogether unfit for the discovery of it. This we are all sensible of: accordingly, as often as evidence is worth weighing, we send it to the tallow-chandlers: they have a method of their own, which it does not suit the purpose of equity to follow. They are allowed to hear witnesses examined and cross-examined, in that natural mode which every man who is really desirous of coming at the truth, and has power to inquire into it, pursues of course, whether in a court or in a closet. Equity receives evidence in a scientific way: a way which was designed, not for the discovery of truth, but for better purposes. I am a learned English judge: it is a rule with all learned English judges to receive evidence in any shape, except the only proper one; they leave that to the tallow-chandlers.

## CHAPTER II.

EXCLUSION BY LIMITATION PUT UPON THE  
NUMBER OF WITNESSES.

SECT. I. — *Excess of evidence an evil — Peremptory limitation not a proper remedy.*

THERE are some topics on which, on a superficial glance (especially if directed by the contemplation of established practice), a fatal dilemma presents itself as hanging over the footsteps of the legislator; and, on one side or other, the very nature of things seems to have imposed on him the necessity of injustice. On a closer view, to him whose eye has strength to penetrate this mist, the difficulty may be seen to be in a great measure factitious; and to arise out of some irrational practice, into which, under the pupilage put upon him by the man of law, the imbecility of the legislator has been misled by the imbecility or improbity of his guide.

Of the above-described state of things, an exemplification may be found in the arrangement which forms the subject of the present chapter.

What number of witnesses shall a party be allowed to produce? Put a limitation any where upon the number, you lay the party

under the necessity of leaving the mass of evidence on his side incomplete: you pave the way to deception, and consequent misdecision. Put no limitation any where upon the number, you put it in the power of a *mala fide* suitor (if superior to a certain degree in respect of opulence) to overwhelm his adversary with an indefinite load of testimony, and the expense, vexation, and delay, attached to it.

In the case which came under review in the last chapter, the ground of the exclusion (so far as, in respect of reason and utility, it had any ground) appears to have been the fear of deception. In the case now before us, the consideration of vexation appears to have been the ground.

The vexation liable to be produced by multitude of witnesses, or (to speak more extensively) by the quantity of evidence, has two branches; which, being in themselves perfectly distinct, require to be kept so in the mind of the legislator. Why? Because, according as it is in the one shape or the other that the inconvenience presents itself, so, in so far as the inconvenience admits of remedy, will the remedy.

There are two stations in the cause, to which the vexation, considered in its first stage, is apt to apply itself: that of the parties, and that of the judge.

To the station of the parties, considered in the aggregate, it is pregnant with delay and with expense. Consider them separately, the expense attached to the production of each witness falls, in the first instance at any rate, upon the party by whom, or at whose instance,

he is produced: ultimately, either upon that party or another, according to the arrangements made by the judge in respect to this part of the costs.

Upon the judge, this inconvenience will not naturally fall in any other shape than that of vexation, properly so called: expense, out of his pocket is not destined to come; by delay he will not, in the manner that a party would, be affected. It is in the shape of labour only, that the vexation falls upon the judge: perplexity, followed by the labour consisting in the exertions made to remove it.

The judge being a member of the community, as truly as the sovereign by whose authority he has been appointed, or the servant by whom his shoes have been cleaned,—any pain that, on this as on any other occasion, falls upon him, constitutes as large a part of the pain of the community, as an equal pain falling upon either of the other two. But on the present occasion, be it what it may, it can never enter into competition with the mischief that would ensue from the removal of the dolorific cause, viz. the labour of weighing the mass of evidence: that mass, by the supposition, being in every part necessary to be weighed,—in every part such, that the exclusion of it would be productive of a correspondent chance in favour of injustice.

The burthen, thus, on the particular occasion in question, sustained by the judge, is a part of that aggregate burthen, the pain of which cannot but be regarded as balanced, and more than balanced, by the remuneration, in whatever shape (dignity at any rate), attached to his

office: and even setting aside such recompense, it can hardly be supposed that the mischief of the utmost vexation liable to fall upon that single individual, can come into competition with the mischief falling, in the other case, upon the community,—the notorious, and consequently extensive, mischief attached to the corresponding chance in favour of injustice.

In respect of serious importance, the sort of vexation which in this case is borne by the judge, is, therefore, as nothing, in comparison with the mischief which, in consequence, is liable to fall upon the parties; that is to say, upon that one of them who has the direct justice of the cause on his side. The greater the mass of evidence in the cause, the heavier the burthen imposed by it on the mental faculties of the judge: the heavier the burthen on the judge's mind, the greater the probability that his force of mind will not be adequate to the sustaining of it,—to the acting under it in such manner as to extract the truth from the mass of matter through which it is diffused, to frame to himself a right judgment respecting the principal facts in dispute, and to decide in consequence.

In the shape of danger, the mischief will in this case be considerable, even supposing the clearest impartiality and most consummate probity on the part of the judge. These qualities being supposed, the state of the law being supposed clear, and, in respect of the question of fact, the cause being supposed not to be attended with any extraordinary degree of intricacy or difficulty,—the probability in favour of a right decision will be very great: say, for example, 100 to 1. But suppose the faculties

of the judge in a state of complete confusion, and the force of his mind altogether unequal to the task of framing a right decision under the pressure of the burthen thrown upon it by the aggregate mass of evidence,—this chance of 100 to 1, will be reduced to an even chance, or chance of 1 to 1: at which point, the party who is in the right will have no greater chance of prevailing, than the adversary who is in the wrong. At this point, the advantage possessed by him who is in the right is equal to 0: and to this point, every additional quantity added to the load of evidentiary matter, tends, in proportion to its pressure, to reduce the cause.

Such is the case, even where the probity of the judge is at its highest point, and the state of his affections entirely neutral. But, let either self-conscious partiality or bias be supposed on the part of the judge, the danger is much increased. Every addition seen to be made to the pressure of the burthen of evidence on the mind of the judge himself, contending against it with the peculiar advantages attached to his station and appropriate habits of exercise, will naturally press with still greater force upon every other mind not bound to the task by duty, and less qualified for it by exercise. The greater, therefore, the pressure is by the public eye seen to be, the more difficult will it be for the public judgment to detect any aberration on his part from the line of rectitude: and, moreover, even to any man to whom his decision may present itself as taxable with error, the greater will be the probability that the error will present itself as standing clear, if not of intellectual, at any rate of moral, blame.

In a word, the greater the burthen of the evidence, the greater, in appearance as well as reality, the difficulty in judging of it: and the greater that difficulty in reality, the more natural will erroneous judgment be: and the greater the difficulty in appearance, the more venial in appearance will the error be, the less apt to expose him, whose error it is, to public censure.

The evils, therefore, which arise from excess of evidence, are very great: and that they form a proper subject for the legislator's consideration, is out of the reach of dispute. But, that the propriety of allowing them to be productive of actual exclusion, of giving them in practice the effect of a conclusive reason, depends upon *proportions*, (viz. upon the preponderance of the collateral inconvenience in the shape of vexation, expense, and delay, as compared with the probability of direct mischief resulting from deception and consequent misdecision for want of the evidence proposed to be excluded), is a point upon which a decision has already been pronounced, on grounds which the reader has had under his view.

Proceeding on this ground, the necessary conclusion is, that every thing that on this field has been done, in any of the established systems, is wrong. For whatever has been done, has been done by limiting the number of witnesses receivable, without regard to the demand.

Regard being paid to proportions, one most obvious consideration is, that, in respect of number, the demand for witnesses will depend upon the subject matter of the suit.

1. Even where the claim which is the foundation of the suit is itself simple, it may hap-

pen, that the number of witnesses which it may be requisite to hear has no certain limits: take, for example, a claim of a right of way; a claim of a right of common; a suit, the object of which is to determine the bounds between portions of land, the property of different owners.

2. The nature of things affords several sorts of suits, in which, in respect of the subject matter, the demand itself is complex; and complex to a degree altogether without limit. In this case, the suit, though in name and to some purposes but one suit, is in fact a cluster of suits. Thus, in case of an account, the complex suit includes as many simple suits as there are items on both sides. Not one of them but is capable of being taken for the ground of a separate suit: in which suit, the number of witnesses to whose testimony it may be necessary to have recourse, has no certain limits.

#### SECT. II.—*Remedies suggested.*

As it is with a physical burthen, so is it with a psychological one: undivided, the patient sinks under it; divide it, he performs the task without difficulty.

You have a burthen, which you wish to have carried, within a certain time, to a certain place. Having called a porter, you propose the job to him: he declines it, he pronounces it impracticable. Your job, must it for that reason remain undone? By no means. Common sense indicates a variety of expedients, all of them practicable, one or other preferable, according to the circumstances of the case. The burthen may be divided, and distributed between two

porters : being divided, it may be carried by the same porter at two turns : perhaps even it may be taken by him at one turn, if he be allowed a little more time.

The burthen being thus of the physical kind, the remedies thus applicable to any extraordinary weight that may belong to it will never fail to be applied : common sense will dictate the expedients ; self-regarding interest will secure the application of them. Understand, if the burthen be mine, and if it be for a purpose of my own that I wish it carried, and if it be by myself that the charge of getting it conveyed is undertaken : for if, instead of being managed by myself, the business be committed by me to a servant, who is lazy, or careless, or ill-affected to me, or who has any thing to gain by having it miscarry or arrive too late, it may make a difference.

Where the burthen is of the psychological kind, the remedies will be no less obvious : unfortunately, the application of them will be far from being alike secure. In this case, as in the other, the advice of common sense, if consulted, would be equally sure : but, unfortunately, the hands on whom the business rests are such whose purpose is not answered by the taking any such advice.

Had the ends of justice been the ends of actual judicature, this, like so many other mischiefs with which the technical system swarms, or rather of which it is composed, never could have taken place. Had the foundation of every cause been laid in the simultaneous appearance of the parties *coram judice*, no such danger as that of an inordinate influx could have existed. So

much as the cause really required, and by its importance was capable of paying for, just so much would be delivered, and no more. When in this way any thing of excess takes place, it is only for want of those explanations, which, in case of the sort of meeting above described, cannot fail of taking place, but which can scarce ever take place with effect on any other terms. This, accordingly, has already been stated as one of the uses, though but one, and (from the rarity of its occurrence) one of the least considerable of the uses, of that meeting; without which, judicature is no better than a game, in which justice, in spite of design, turns up now and then by accident.

Of the established system of procedure it is a fundamental principle, not to hear the parties, not to suffer either of them so much as to come into the presence of the judge, till the very conclusion of the cause. Not hear the parties? Whom then would you hear? Not till the end of the cause? What then is the sort of work that is to be going forward in the mean time?

Under a system set up in opposition to the ends of justice, the idea of the ridiculous hangs over every step of an inquiry that has for its object the pursuit of any of those ends: it is as if a plan for the more effectual propagation of Protestantism were to be presented to the pope.

To find the average quantity of time really in demand for a cause, turn to any of those courts in which the path of judicature leads to the ends of justice: turn, for example, to the courts

of conscience, you will find it only a few minutes. But as the nature of that jurisdiction admits not of any very complex causes, and as here and there a cause will present itself which may require as many months; putting all causes together in hotch-pot, the average upon the sum total may thus come to be doubled or trebled.

In a vast majority of the individual cases that turn up, not the faintest glimpse of any such difficulty will present itself: such is the simplicity of the vast majority of cases that call for the exercise of judicial powers. But, when a cause is to a certain degree complex, then comes the necessary task of sketching out a plan of the mass of evidence. What is your demand, what your title, and what your evidence? Three questions these, to which a plaintiff, if he knows what he is about, will always be more or less prepared to give an answer: and which a judge, if he knows what he is about, will of course put to the plaintiff, wherever the plaintiff, for want of distinct conceptions, has not put them to himself.

What then is this plan or table of evidence? In every cause in which a question of fact is involved, the nature of it may be seen at the conclusion of any one of those instruments which among English lawyers are called briefs: facts which, in the character of principal facts, are to be proved; persons or scripts, by which each such fact is expected to be proved. To the plaintiff's table of evidence add that of the defendant, you have the sum total of that mass of proposed evidence, concerning every article

of which, the judge will have to consider whether at all, and if yes, then in what event, and at what time, it shall be delivered.

1. Where the demand itself is of a complex nature, (*i. e.* where the cause, though in form and denomination but one cause, is in reality an aggregate of a number of causes), analyze this artificial whole: resolve it into its elementary parts. Suppose an account current, with a hundred items on each side: a hundred items, to any one or every one of which it may happen to be contested. How absurd in this case to think, by means direct or indirect, to limit the multitude of witnesses! But there being in fact two hundred causes to try under the name of one, there is not one of them that may not, without prejudice to the interests of truth, be tried at a different time, at a different place, by a different judge or set of judges. In a cause of this composite order, two witnesses may be one too many; two thousand may be not sufficient. Behold now the legislator, with shut eyes, and Procrustes for his guide, by arrangements direct or indirect, fixing the number of witnesses which, in a cause of this denomination, a plaintiff or a defendant shall be permitted to produce.

No grievance, no remedy. Here is in truth no grievance: but if in this way a remedy be attempted to be applied, (that is, any thing under the name or notion of a remedy,) then indeed there is a grievance; for the pretended remedy is a real grievance.

At his own pleasure, and by and with the advice of his attorney, (who in the temple of equity puts on the more respectable and profit-

able title of solicitor,) a man who has a business of this sort to settle with an unwilling adversary, addresses himself to common law or to equity. If to common law, — after six months or twelve months spent in doing worse than nothing, spent in affording the occasions for learned pillage, the two hundred causes, if tried at all, must be tried in a day, or in the remnant of a day. If to equity, — after the number of months, not to say years, employed in doing worse than nothing, as above, — when the matter in dispute comes to be tried in good earnest, the cause is wiredrawn through a hole in the judge's closet, and instead of the one day, as above, is drawn out perhaps to a thousand: the judge (called in this case a master), under the eye of a conniving chancellor, taking care to be paid for three attendances for every one he bestows, and cutting out each day into hours, that each hour may have its fee.

On either side of the passage, what in all this can there be that could be better than it is? On the one side, is not work made for a jury? On the other side, is not every thing done by *equity*? by equity, the *bona dea* of English lawyers, made by their own hands for their own use, unknown to all the world beside?

2. In a cause in which the matter in dispute is a man's right to a station filled by election, there may be as many causes as electors, including persons assuming to be electors; the right of each elector depending upon an indefinite quantity of evidence, generally very small, but susceptible

of extension, without any certain limit. Squeeze now a complex cause of this sort into the compass of a day, and observe the consequence. Before the Grenville Act, causes of that sort were compressed each into the compass of a day; and the consequences were such as at length gave birth to that not inconsiderable effort of innovating and meliorating wisdom. The condensing engine being broken, the quantity of matter which by fiction had been compressed into the compass of a day, has now been found to fill in reality the compass of sometimes not so few as a hundred days, and a hundred days fully employed. But as a cause of this sort consists, in truth, of so many dozen, or score, or hundred of causes; if constitutional prejudices and misgivings would but permit, what a prodigious load of vexation and expense might not every now and then be saved, if in these causes the witnesses could be heard within a reasonable distance of their own doors, instead of being imported from the Orkneys, or the Land's End, to be fed for an indefinite time at London prices.

3. Suppose a cause in which the matter in dispute is the supposed disturbance or abuse of the rights annexed to some station or condition in life, domestic or political. The disturbance or abuse constitutes one group of facts, the entrance into the station another. Entrance and disturbance: marriage and adultery: entrance and abuse, appointment to an office, and abuse of the powers of it. The scene of the entrance lies at any number of miles distance from that of the disturbance or

the abuse. Two groups of facts thus distinct and unconnected, what need, or even what use, that the proof of both should be crowded together into the same portion of time, into the same portion of space, only that they may come under the eyes of the same judge or judges? In London, cohabitation between man and wife on the one hand, adultery of the wife on the other: actual marriage, in the East Indies. The cohabitation public and notorious, the adultery susceptible of proof,—why must redress be made to wait, not only for the definitive result but even for the preliminary steps, till proof, in form, of what no one doubts of, shall have been sent for and fetched from the East Indies?

The mass of evidence thus decomposed in idea, and resolved into its ultimate elements; frequently it will happen, not only that by an apt distribution of it among different portions of time and space, the quantity of vexation, expense, and delay, attached to the delivery of the evidence, may be reduced; but the quantum of the evidence necessary to be delivered, may itself be reduced. It is in this way, and this alone, that, by any management, a retrenchment may be made to the mass of evidence, (understand relevant evidence,) and without prejudice to the direct ends of justice. A second mass of evidence, No. 2, may be relevant, may be indispensable; but it is only on the supposition that the mass of evidence No. 1, has already been delivered, (or not delivered). Take away the one, you take away the demand for another. Keep back the testimony of Titius,

the proof that would have been offered of his bad character, or of his having been elsewhere at the time, is no longer relevant.

Expedients upon expedients, on a review of the circumstances of the individual cause, might be employed for reducing the amount of the evidence, and of the vexation, expense, and delay, attached to the delivery of it, within the narrowest limits compatible with the due regard to the direct ends of justice. 1. What is it that each man is expected to prove? 2. By what circumstances is he enabled to prove it? 3. From which of the witnesses on both sides is the most decided and satisfactory evidence to be expected? 4. Which are those between whom an irreconcilable contradiction may be expected; and in whose instance it is most particularly requisite that they be brought face to face? 5. Are there any masses of evidence, by the use of which, if the decision be in a certain way, the demand for the other may be superseded?

Where no such preparatory explanation takes place (that is, under all technical systems), superfluous evidence is poured in in abundance: not only all that will be wanted, but all that by possibility may (it is supposed) be wanted, is provided. In continental Roman procedure, and in English equity, the shelves are thus loaded with depositions, which, when they come to be looked at, are found not to be necessary, and which accordingly are not employed in argument. At common law, before a jury, crowds of witnesses are in attendance, who, when the trial comes on, remain unexamined, either because there is really no need of their

evidence, or because there is no time for hearing it.

At the same time that the number of the witnesses, and in general the quantity of the evidence of all sorts, that may or may not be necessary, is thus brought forward on all sides,—all circumstances which, in the case of this or that witness or other article of evidence in particular, may operate in enhancement of the vexation, expense, or delay, attendant on the production of that witness or other article of evidence, in like manner should be brought under review. And thus and thus only it is, that the judge finds it in his power to do what justice requires him to do in respect of collateral inconvenience: in the first place, to take the arrangements necessary for reducing it to its least dimensions; in the next place, to determine whether (a case which, though rarely, may sometimes happen) the injustice that would result from the production of the proposed evidence, would not preponderate over that branch of injustice which stands opposed to the direct ends of justice, viz. the frustration of a just demand: or, on the other hand, (not to make an unnecessary sacrifice of the principal to the collateral ends), whether, provisionally at least, inferior evidence may not be employed, instead of superior from the same source: makeshift, instead of regular: transcriptural, for instance, instead of original.\*

\* A curious enough and instructive comparison might, on any sitting of *Nisi Prius*, or still better on any circuit, be afforded by two lists: 1. list of the persons summoned to attend as witnesses; 2. list of the number of persons actually

In causes that are fortunate enough to find themselves removed out of the hands of the regular courts into those of special arbitrators, mutual and preparatory explanations take place of course: at any rate, there is nothing to prevent them from taking place, but those accidental deficiencies in point of probity or intelligence, to which all tribunals, and all human affairs, are exposed. In these tribunals, it is to the judge that any failure in this respect ought to be imputed: for if, on a requisition made by the judge, any backwardness in regard to compliance be manifested on either side, such reluctance will but afford an additional reason for insisting upon compliance.

These observations, if well grounded, will be worth the attention of those public tribunals, whose hands are not tied up by any of those manacles which have laid the regular courts under the not altogether unwelcome impossibility of obeying the voice of justice. I speak of parliamentary election courts, courts martial, and courts of inquiry, military and naval: for as to the courts held by justices of the peace out of sessions (I speak of the case in which their jurisdiction is definitive), it is seldom indeed, that a cause coming before any such tribunal will be complex enough to afford

examined at that same place, or succession of places. Of the first of these lists the materials are at any time to be found.

On the last occasion that has happened to fall within my knowledge, of four witnesses that attended on one side, one only was examined: yet, under the uncertainty that, for want of the sort of explanation in question, hung over the cause, there was not one of the three whose attendance could prudently have been dispensed with.

the matter for any such arrangement: and the same observation may be applied *à fortiori* to the courts of conscience.

In these, and all other courts in which the ends of justice are the objects of judicature, inasmuch as the preparatory explanation in question always may be called for, so (proportioned to its obvious utility to all persons concerned, and more especially to the judges) is the expectation one should naturally form of seeing it called for in each individual instance. But against this expectation there are two circumstances which operate on the other side: 1. the propensity which all tribunals of inferior account have to imitate the practice of their superiors; and 2. the propensity which all tribunals have to shackle themselves by general rules; extending an arrangement from the one case, the one individual case in which it was found conformable, to an unknown succession of other cases in which it would not be conformable, to the ends of justice.

What? Shall my client then be compelled to disclose the plan of his defence? As well might you call upon him to criminate himself, or upon me to betray the trust he has reposed in me. Such is the objection which, on an occasion of this sort, the consciousness of a bad cause will put of course into the mouth of the experienced advocate: such the sort of argument which finds all ears open to it, under that system of which the *spiritus rector* is the spirit of insincerity. For, under the technical system, such is the state of things towards which every thing gravitates, such the notions attached to the word *equity*; viz. that on every occasion,

justice and injustice, fraud and sincerity, shall have an equal chance.

With reference to this topic, causes, whether criminal or non-criminal, may be distinguished into three classes.

1. The sort of cause in which, on the first meeting, the whole stock of evidence which the cause affords is visible at once: as, where the cause turns on the testimony of one or both parties, with or without an adducible script or two, or an adducible witness or two, on one or on each side. Under this description will be included the vast majority of causes. In this case, the cause is already ripe for decision.

2. The sort of cause in which,—though the whole stock of evidence be not adducible on both sides,—yet, on each side, every article of evidence proposed to be adduced, is capable of being indicated. In this case comes the demand for the mutual explanations above indicated, and the operation of marshalling the witnesses and documents, in consequence. Ripe for decision the cause may in this case be, perhaps the next day, perhaps not for any number of years afterwards. For who shall say, in every case, at the end of how many months a witness shall be forthcoming, in a country in which voyages to the antipodes are in every day's practice?

3. The sort of cause in which a man believes or suspects a fact (a principal fact) to have taken place; but, even supposing it to have taken place, knows not as yet by what evidence it may be proved: *e. g.* that an act of murder has been committed, the author suspected or not suspected: that an instrument produced in

the character of a deed or will, is spurious or falsified: that the parentage attributed to a child is false: that a deed or will, though genuine, was obtained by fraud or force. In this case, the cause is neither ripe for decision, nor ripe for any such exhibition and analysis of the mass of evidence, as above.

To this sort of cause applies the demand for investigatorial procedure; that sort of procedure which Roman law has confined to criminal cases, English law (to the extent of the regular system) has denied to all cases, feloniously criminal cases alone excepted, in which, through the medium of the preliminary examinations prescribed by statute, it has been blown in, as it were, by a side wind.

To pursue, through any further exemplifications, the decomposition of the aggregate mass of evidence, would be beyond the design of the present Book: what is above, will, it is hoped, be found sufficient at once to indicate the nature of the operation, and the use.

SECT. III.—*Aberrations of established systems in this respect.*

IN the next chapter we shall have occasion to examine the indirect modes in which all evidence, over and above a certain quantity, has, under established systems, been excluded. In some cases, however, the indirect and disguised exclusion not being strong enough, and the only rational remedy, the preparatory explanation and arrangement, being unendurable, exclusion was to be applied without disguise, and in direct terms. Such, accordingly, upon

the continent, has been the resource: take French and Spanish law for examples.

To any given fact or question, (*fait* (fact), French; *pregunta* (question), Spanish,) thirty witnesses were and are allowed by Spanish law; ten only are, or at least were, allowed in French law. Are both right? One French witness, then, is equal to three Spanish ones.

Of these limitations, what upon earth could be the design? To make work for advocates? To give the judge a facility for favouring whom he pleased? If so, it was well aimed: to any good purpose, completely useless. On the nature of the cause, no distinction grounded: under this direct exclusion, as under the indirect one, the same allowance for all causes.

*Fact—question:* — of the unity of the fact or question, who shall give the criterion? Nobody: criterion there is none. You are a French judge: a man who has produced ten witnesses wishes to produce more. Would you have him lose? Stick to the unity of the fact, and you stand firm upon the law. Would you have him gain? Split the fact into two, you may then allow him as many as twenty witnesses. Are twenty not enough? Take up the metaphysical wedge, and drive it in once more. We have seen that to split one man into two witnesses is every day's practice.\* That was a clumsy trick: men, like oaks, are "gnarled and unwedgeable;" facts, like deals, are fissile.†

\* *Suprà*, p. 482.

† *Instituciones del Derecho Civil de Castilla*. Madrid, 1791. 4to. p. ccci. Titulo vii. de las Pruebas. Cap. iv. de la

prueba de testigos, p. ccci. "Se segue 1. Que solamente hagan fé en juccio dos testigos: . . . no pudiendo exceder el numero de treinta para cada pregunta (question) diversa." From *Recompilacion*, i. 577. Lib. 4. tit. 6. sec. vii.

Ordonnance Civile de Louis XIV. anno 1667. Tit. xxii. des Enquêtes. Art. xxi. "Ne seront ouïs plus de dix témoins." *Conferences*, p. 305.

Art. xxi. "Defendons aux parties de faire ouïr en matière civile plus de dix témoins sur un même fait, et aux juges ou commissaires d'entendre un plus grand nombre; autrement la partie ne pourra prétendre le remboursement des frais qu'elle aura avancés pour les faire ouïr, encore que tous les dépens du procès lui soient adjugés en fin de cause."

In a cause of the civil class, the French code of procedure forbids and admits the receipt of more than ten witnesses, at the instance of any party, to each fact (*fait*); so that, if an eleventh witness be produced by any party, the judge, according as he likes or dislikes the party, admits or rejects the witness. The law admits him: but under this condition, viz. that the expense attached to the testimony of that witness shall rest on the party by whom he is produced, although costs of suit be adjudged to him at the conclusion of the cause. The law excludes him: for, over and above this condition, operating as a license or as a penalty according to the point of view in which it suits the judge to contemplate it, there is an express prohibition: a prohibition as express as words can make it, a prohibition without any condition, and addressed not to the parties, but to the judge. We forbid them (judges and commissaries) to have any greater number.

At the conference, great debate between Passort, who appears to have been the author of this code, and the Premier President of the day. The president disapproves of the limitation, but yields; saying, that, the case of a party wishing to produce any greater number not being likely to happen frequently, the matter is of no great consequence. Passort defends his article, and prevails. On the condition specified, a party (he insists upon it) is at liberty to produce as many witnesses as he pleases. You have to give judgment on this article: would you let in the supernumeraries, refer to the condition; and if that will not do, pray in aid the common vouchee, the author of the code. Would you shut them out? stick to the text, and turn a deaf ear to all histories and commentaries.

## CHAPTER III.

EXCLUSION PUT BY BLIND ARRANGEMENTS  
OF PROCEDURE UPON INDETERMINATE POR-  
TIONS OF THE MASS OF EVIDENCE.

A PROPOSITION that seems neither to require, nor (any more than a postulate in geometry) admit of proof, is, that every arrangement of procedure, the effect of which is to exclude an indeterminate portion of evidence,—of that stock of evidence, which the cause, in the individual instance in question, happens to afford,—and that, too, without the plea of preponderant inconvenience in the shape of vexation, expense, and delay,—is irreconcilably repugnant to the ends of justice. In every cause to which the operation of the principle of blind defalcation happens to extend, the effect of it is, to reduce to an equal chance whatever preponderant probability of success a good cause may, under the system of procedure in question, give a man as against a bad one.

Such is the result, and such the mischief, supposing the composition of the defalcated mass to depend altogether upon blind chance. Suppose, on the other hand, that it is capable of being influenced by arrangement, by arrangement on the part of either of the parties; the probability of success, instead of being equal,

will be preponderant in favour of injustice. He who, being in the right, is persuaded of his being so, will not naturally have recourse to this or any other sinister artifice: at least he will not be urged so to do by so strong an impulse as that by which the opposite party, supposing him to be in the wrong, and conscious of being so, will be urged.

Had the ends of justice been, in every country, the ends to which the system of procedure had, in the course of its formation, been directed, no arrangement pregnant with any such effect would perhaps any where have been established. But in no country has the predominant part of that system been really directed to those ends: accordingly, arrangements pregnant with that absurd and pernicious effect are to be found established in both of the two systems of technical procedure, between which the more enlightened part of the population of the globe has, in such unequal proportions, been divided.

In the Roman system may be seen one example of an arrangement, by which an indeterminate portion of the obtainable mass of evidence is shut out.

In the English system may be seen an example of another arrangement, which, discordant as it is with the Roman in other points of view, agrees with it in this.

The Roman arrangement here in view, is that by which, whatsoever part of the evidence can by possibility be kept secret from the parties respectively, (*viz.* every part of it but that which has been extracted from a party himself), is, with the most anxious care, kept from the

knowledge of both, until the time when the process of collection is closed.

From this arrangement is apt to result the exclusion of an indeterminate and indefinable mass of counter-evidence. The portion thus excluded is divisible into two distinguishable branches: 1. the additional mass, which, had the already extracted portion been known to them in time, might and would have been extracted by the parties respectively, whether from the witnesses on their own side respectively, or from those on the other: 2. any such further portion as, in explanation, confirmation, or contradiction of the testimony actually delivered (as above), might have been extracted from the bosoms of other witnesses.

Such, then, in a few words, is the effect: exclusion of ulterior evidence obtainable by counter-interrogation of the same witnesses; exclusion of counter-evidence extractible by interrogation and counter-interrogation from ulterior witnesses.

The English practice is that which, in civil cases, limits the mass of evidence to the quantity the delivery of which can be squeezed into the compass of a single sitting: deducting the quantity occupied by the introductory statements made by the advocates on both sides, and the recapitulation made by the directing judge.

Of the nature of the mass of evidence thus shut out, it is not easy to give any the loosest estimate: not so much as the sort of estimate, than which nothing can easily be more loose, given of that which is shut out by Roman practice.

To assist conception, cross over from time to space. Suppose a court (and you need not look further than Westminster Hall to find four such) which, in the case of a cause of a nature to excite that sort of interest, on which the purity of judicial conduct so essentially depends, shall be capable of affording hearing and seeing room to no more than a tenth or a twentieth part of the numbers that would be there if they could. Nine persons out of every ten are thus excluded from the exercise of the functions of a member of the open committee of the public, charged with the inquiry into the conduct of the courts of justice. Who, in each individual instance, are the persons on whom the lot of exclusion falls? When for this question a precise answer has been found, on the back of it will be found an account of the articles of evidence excluded by that law of the judicial drama, which (substituting the dramatic unities for the ends of justice) requires the business to be compressed within the space of time during which a mixed multitude of persons are capable of continuing together in the compass of the same close room, without prejudice to the free exercise of their intellectual faculties.

Incompatible as this system of condensation is to the ends of justice, it wants nothing of that which is necessary to adapt it to the ends of established judicature. Sufficient or insufficient to the purpose of doing right to the parties, the time is never less than sufficient to the gathering in of fees.

The door, does it happen to have been shut against this or that article of necessary evi-

dence? So much the better. Then come other exigencies, far better adapted than any evidence to the use of lawyers. At law, necessity for new trials, and motions for new trials: in equity, necessity for bills of review, or bills partaking of, or in some convenient shape or other approaching to, the nature of bills of review. An entire cause, with all its evidence, does it happen to be shut out in the lump, because there was not time so much as for the opening of it? Causes are not like strawberries or mackerel: at the end of six months, or of twelve months, they are as fresh as ever; and then they come garnished with fresh fees.

It is only in causes of a complex nature, that the operation of the principle of exclusion can attach: causes which, whether in any other respect or no, are complex at any rate in respect of the number of witnesses from whom relevant evidence might have been extracted. Call twenty-four hours the utmost extent of a single judicial sitting. There are some causes, (and of this description are the major part of the causes instituted), for which a quarter of the number of minutes would be more than enough: there are others, for which three or four times as many days might be a scanty allowance.

Where the allowance of time presents itself as insufficient, the quantity of evidence discarded by each party, (at least if acting *bond fide*,) will naturally be that which in the judgment of the party can best be spared.

Of either party, if *in mala fide*, one resource will be, the crowding in evidence in such quantity as to generate confusion; and, by blinding the eyes of those to whom it belongs to judge,

to raise in this way the unfavourable prospect to the level of an even chance.

In any case, the undue advantage from the compression gravitates towards the plaintiff's side. His evidence being the first heard, the more he introduces of his own, the less he leaves it possible for the defendant to introduce. Out of the supposed maximum of four and twenty, the greater the number of hours occupied by the one, the less the number left to be occupied by the other. The advantage of this policy will, however, be clearer, if the plaintiff who avails himself of it be *in malâ*, than if *in bonâ fide*: for in the latter case, what he gains by the exclusion of his antagonist's evidence, may be lost in some measure by the confusion produced by the multiplicity of his own.

In the midst of all this darkness, a difference may, however, be observed between the effects of the Roman and those of the English practice. Of the disguised exclusions wrapped up in the system of concealment, the influence extends without distinction to the most simple, as well as to the most complex causes: for upon the Roman plan of inquiry, there is never any want of time for the extraction of evidence, if the demand presented for ulterior evidence by the evidence already extracted, were but known in time.

In the English mode, the genius of exclusion confines his operations (as hath been seen) to complex causes. The mischief produced by the English is, therefore, not nearly so extensive as that produced by the Roman mode.

The systems here distinguished by the .

names of Roman and English, are both of them (it must not be forgotten) alike in use in England. But on the continent of Europe, the Roman practice extends to all courts, at least to all regular courts: in England it is confined to the courts called *equity* courts and *ecclesiastical* courts.

The compression (that is to say the defalcation) produced by the rule which confines all causes to the short allowance of time above mentioned, is not, however, by any means the only defalcation to which, under the English system, the pabulum of justice is condemned. Those common law causes alone excepted, which are furnished by the neighbourhood of the metropolis; in the whole stock of causes, the mass of evidence is subjected to an ulterior compression and defalcation, to an amount equally indeterminable. A certain portion of time, two days, or thereabouts, is allotted, with the utmost regularity, to whatever number of suits it may happen to a whole county, to a thirtieth part of England, to have supplied in the compass of half the year. Six hours, for example, may by this means be the whole allowance made to a cause, which, had the scene of it lain within the privileged spot, might have had the benefit of the full allowance, sufficient or insufficient, as above described.

In both cases, how fares it with the aggregate mass of causes, in number and bulk unlimited, shut up within a limited compass of time? As it fares with a multitude of men or other animals shut up within the walls of a town or any other boundaries, with a limited and insufficient quantity of food: their fate is

disposed of by the three co-regent powers, force, fraud, and fortune : some batten, some are pinched, and some are starved.

Ever and anon, the fruits of necessity in this line are brought to light, as it were by chance. The nature of the cause opened, or begun to be opened,—Stop (cries the judge); what sort of a cause is this to try! I can't try it, not I; I won't so much as attempt it: it is not to be done. Necessity, by which every thing is justified,—necessity, thus invoked, comes in and justifies denial of justice. From a tribunal which does not afford itself so much as a possibility of doing justice, the cause is then shuffled off to another, which, having time for collecting evidence, wants nothing but the means: the cause is referred to unlearned judges, under the name of arbitrators: pressed by the tide of authority, though without direct and adequate coercive power, the parties (whether *in bonâ* or *in malâ fide*) are wrought upon, in some way or other, to consent to this arrangement: arbitrators chosen, one on each side: the foreman, or some other distinguished member of the jury: some advocate, mutually agreed on, as not being engaged on either side: nothing deficient but the power of compelling the production, and providing for the trustworthiness, of evidence. The instruments they possess for bringing the truth to light, are good against every body but those who are dishonest enough to wish and endeavour to suppress it.

As often as this necessity betrays itself, just so often does it appear, that in cases of this description, trial by jury, conducted as it is conducted, is incompatible with justice. What

matters it, in the view of lawyers and their dupes? What in their creed is this sacred institution? Not a means to an end, but itself an end. The use of judicature is—what? Not to render justice, but to make work for juries.\* And why make work for juries?—Why? but because trial by jury, is trial with lawyers, with forms upon forms, heaped together for the use of lawyers.

The mutilation of the body of necessary evidence, or, in other words, the exclusion of an indeterminate part of it, has thus far been brought to view as an effect produced in every technical course of procedure. Two arrangements, one of the Roman, the other of the English system, have at the same time been brought to view in the character of so many efficient causes, by which that effect has actually been produced.

That, under the English system, the production of any such effect was, so much as in the anticipation of the authors, among the final causes of the arrangements themselves, is what there seems little reason to suppose.

But in speaking of the Roman system, the design of producing this very effect (pernicious as we have seen it to be) has been expressly stated as a final cause, or rather as the final cause, of the arrangement, the systematic concealment, by which the effect is produced. Concealment, a practice so natural to iniquity,

\* Always understood, that in the progress of the cause no such word as the word equity be pronounceable. For, equity being still more propitious than law to lawyers, speak but the word *equity*, and the use of juries vanishes.

a practice, unless under special circumstances and as against special mischiefs, so unnatural to justice, so abhorrent to the general complexion of English judicature,—required (it seems to have been thought) a reason to justify it in the sight of English lawyers, when the Roman system came to be planted in English soil.

Problem:—In all cases (except, in criminal cases, the preliminary *ex parte* inquiry), the receipt of evidence being public at common law; required, to find a reason for its being kept as secret as possible in equity. Such being, on one hand, the problem; such was, on the other hand, the solution: the only solution that could be found for it.

First, let us observe the practice; then, Gilbert's reasons for it.

State of the practice.

1. In the oath taken by the persons who to this purpose act as judges *ad hoc*, (*viz.* in the district of the metropolis, the examining clerk; out of the district of the metropolis, the commissioners nominated by the parties) are these words:—"And you shall not publish or shew the same depositions to any person or persons before publication in the court, without consent of the same court."<sup>\*</sup>

2. "Neither the examinations or depositions, which are taken by commission, can be published, in any case whatsoever, till publication is duly passed by rule in the office, or by motion or petition, for it may be done either way."<sup>†</sup>

<sup>\*</sup> Gilb. p. 142.

<sup>†</sup> *Ib.* 144.

3. "And in this case" (viz. where the party applies to have the time for publication put off) "the plaintiff or defendant, (as the case falls out), must make oath, and so must his clerk in court, or solicitor, 'that they have neither seen, heard, read, or been informed of, any of the contents of the depositions taken in that cause; nor will they see, hear, read, or be informed of, the same, till publication is duly passed in the cause.'"<sup>\*</sup>

Then comes a story of a solicitor, who, to prevent the solicitor on the other side from gaining the further time necessary to the examination of his witnesses, read over to him the depositions already taken on his (the reader's) side.

Such being the practice, behold now the learned lord chief baron's reasons for it.

1. "If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in any interrogatories, he shall never afterwards examine, unless upon special order of the court, upon good cause shewn; *because he must not form his interrogatories upon the discovery made to his commissioners, of what the other side examined to.*"<sup>†</sup>

2. "The fair examination by commissioners is not to adjourn without necessity; . . . but if it be necessary, they may adjourn, not only in time, but place. And this affair must be performed, as far as possible, *uno actu*, that there be as little opportunity as possible to divulge

<sup>\*</sup> Gilb. 146.

<sup>†</sup> Ib. 131.

the depositions, *that neither side may better their proof.*"\*

3. "If it shall appear to the court . . . that the defendant's commissioners attended during the whole time of the execution of the commission, and never exhibited any interrogatories, in this case the court will never grant the defendant another commission, and he must take it for his pains; since he lay upon the watch and catch, only to see what the plaintiff proved, and then, at another commission, to exhibit interrogatories adapted to such matters and questions *as might tend to overthrow all that had been done*; and he shall never be admitted to have this unfair advantage over his adversary: for if he is admitted, after having knowledge of all that his adversary hath proved, to exhibit interrogatories, he may easily conceive what interrogatories to exhibit, and how to hit the bird in the eye."†

Then, immediately after, follows a passage, to state, that, if a new commission is granted, no addition ought to be made to the interrogatories framed for the former one, "without special leave of the court; and" [then] "they are to be settled by a master, and are never done" [*i. e.* this is never done] "but in extraordinary cases."

4. "Afterwards (after publication of the depositions already taken) there could be no examination of witnesses, unless by the special direction of the judge, upon good cause shewn, and an affidavit of the party, that he, or those employed by him, had not, nor would, see the

\* Gilb. 127.

†

depositions of the witnesses which were published; *by reason of the manifest danger of perjury and subornation of witnesses, in case examinations should be allowed after publication.*"\*

5. One reason comes in the form of a parenthesis, and that parenthesis an assumption; the truth of the observation being supposed too self-evident to be disputed: "Since the very life and vitals of almost every cause, and of every man's property, lies in keeping close, and secreting his evidence till after the depositions are published, because after that, there is an end of examining . . . ."†

The view taken by the learned jurist is altogether curious. That either of the parties should possess the possibility of "bettering his proof,"‡ he considers as a result fatal to justice: a result to be prevented at any price. For, of such melioration, what might be the consequence? "It might tend to overthrow all that had been done:" "the bird" (according to his ingenious metaphor) might be "hit in the eye."§

At the time of his writing this, or before, the learned author was head shopkeeper of that great double shop, in which common law or equity is served out, according as the one or the other happens to be bespoke by the plaintiff customer: for the clause in Magna Charta which precludes the sale of justice, precludes not the sale of common law, or of equity. On the common law side, whatever truth is to be served out is warranted entire: the truth, and

\* Gilb. 120. † Ib. 141. ‡ Ib. 127. § Ib. 137, 138.

the whole truth, as well as nothing but the truth, are the words of the oath, expressive of what each witness undertakes for the delivery of. But to what purpose is it, that, from each witness, the whole of such part of the facts belonging to the case as happen to have come to his knowledge are required? To this purpose, surely,—viz. that, from all the evidence together, including the depositions of all the witnesses, the whole assemblage of facts which the case furnishes may be collected. What then, on this occasion at least, is the aim of common law? To come at the truth entire. What, on the other hand, is the aim of equity? To get it mutilated; to get it in a state in which it shall, at any rate, be to some degree or other imperfect, and no one can say in how great a degree. Right and wrong shift their places or their natures, according as the judge sits as a common law judge or as an equity judge: according as the article is served from the one counter or the other.

On the Tuesday, the learned judge, sitting at common law, grants a new trial. There his birds are set up by him, all in a row, though there be a thousand of them; set up like cocks on a Shrove Tuesday, ready to be "hit in the eye" by any body who has a stone to throw at them. The next day the same reverend person sits in the character of an equity judge: and now secrecy is the order of the day; and now "the very life and vitals of the cause lies in secreting the evidence."

But if such counter-interrogatories, or counter-evidence from counter-witnesses, were ad-

mitted, the danger of "subornation" of perjury, and of "perjury," he says, "is manifest."\*

Yes, indeed; but too manifest. Open the door to evidence (meaning sworn evidence), you open the door to perjury. Would you shut the door, shut it effectually, against perjury? Two ways are open to you, and both sure ones: shut the door against all sworn evidence, or shut it against all evidence.

But, when the mass of evidence thus to be shut out is any thing short of the whole, observe the consequence. True it is, that in such evidence as is not produced, no perjury will be contained. But how is it in regard to the evidence which, being allowed to be produced, has been produced accordingly. Assurance against being cross-examined, against being opposed by counter-evidence; assurance against being exposed to contradiction, from themselves or others; security against ulterior contradiction from any quarter:—such is the security proposed as proper to be applied, such is the security actually applied, against mendacity and temerity on the part of witnesses.

That the arrangement proposed by the learned judge, in the character of a security, and that a necessary one, against the mischief of perjury, is naturally (not to say necessarily) productive of that very mischief, is not only manifest enough to every body, but to nobody more so than to the learned judge himself. For by what is it, that, when one party only (say the plaintiff) has examined his witnesses, the commissioners of the other party (the de-

\* Gilb. 120.

fendant) having been present at such examination, the defendant is enabled "*to hit the bird in the eye?*" His commissioners, in violation of the letter of their oaths, communicate to him (the party) the depositions extracted by the commissioners on the other side: for, unless this were the case, whatever were the demand for such suppletory and complementary counter-evidence and counter-interrogation, the party could not have any knowledge of it. So that, in the perjury with which the arrangement is seen to be pregnant, consists the reason, and the only reason, given in justification of that very practice.

This precaution is exactly of a piece with the policy which, in some ages and countries, has, under the auspices of Roman law, governed the arrangements in criminal cases. The prosecutor, on his part, producing his evidence; the defendant, on his part, was not to be allowed to produce any. Why? Because, at this rate, the charge might come to be contradicted; a license which was not to be suffered.

Being relevant, the ulterior evidence thus excluded, would it have been true or false? If true, no great harm, one should have thought, would have been done by it. If false,—but what is there that should make it false, this subsequent, rather than any antecedent, mass of evidence?

Evidence (the testimony of an extraneous witness) delivered in a preceding cause between other parties, is not received in a succeeding one. Why not? Because, in the preceding cause, the party against whom it operates in the succeeding

cause had no opportunity of endeavouring at the correction or completion of it, by counter-interrogation or counter-evidence. In this case, the propriety of the exclusion is not in question here. What is to the purpose, is, that such is the established rule; established, not at common law only, but in equity.

The depositions having been published (*i. e.* communicated to the parties), evidence respecting the character of each witness may be poured in without stint:\* evidence on the one side attacking his character, evidence on the other side supporting it. Evidence of this sort, "generally speaking," says the learned judge, "ends in nothing more than putting the party to an expense to no purpose." Here then, if superfluity of evidence were the mischief to be cut off,—here would be a species of evidence for the knife to operate upon. No such thing. Where the evidence is known, and known to be of that sort which is extendible *ad infinitum*, and after all of little or no use, no such idea is started as that of excluding it. Where the importance of the mass of evidence in question is beyond all estimate, then it is that it is to be barred out; and secrecy is the bar set up against it.

Those who introduced this arrangement into the system of procedure, gave no reasons for it: they did wisely: they had none to give. On this, as on some other occasions, Gilbert has taken it into his head to give reasons: here, as elsewhere, being given, they are worse than none. Under the technical system, the safe course, and the only safe one, to be taken with

\* Gilb. 147.

† Ib. 148.

judges' reasons, is the course taken with them in the House of Lords: to enter them as given, and to give none: none at least which the subject, whose conduct is to be governed by them, and whose fate depends upon them, has a possibility of being apprised of.

## CHAPTER IV.

EXCLUSION BY RENDERING A PARTICULAR  
SPECIES OF EVIDENCE CONCLUSIVE.SECT. I. — *Impropriety of the exclusion.*

ADMISSION of counter-evidence is one of those securities, of the necessity of which, much (it may be thought) would not require to be said.

Exclude out of the budget any article of evidence, whether on one side or another; in proportion to the probative force with which such excluded lot would, had it been admitted, have acted upon the mind of the judge, in that same proportion is the aggregate mass of evidence incomplete.

Exclude, on either side, the whole of the mass of evidence that would or might have been delivered on that side, leaving the door open to whatever evidence is ready to be delivered on the other; misdecision in disfavour of the side on which the evidence is excluded, is not, indeed, by so doing rendered the certain result, (since there remains the possibility that the unexcluded evidence may not gain credit); but, at any rate, the tendency of such arrangement to give birth to misdecision, seems too palpable to be matter of doubt to any one: so palpable, as to produce, as it were, a mecha-

nical and instinctive idea of one of the most revolting modifications of injustice.

*Audi alteram partem*, says the common adage : before you give judgment, hear whatever there may be to be said on the other side. As a memento, good : for information, for guidance, not sufficient. To be said ? In what way ? In the way of evidence ? In the way of observation upon evidence ? There are few cases in which observation on evidence may not be of some use ; there are none at all in which evidence itself is not absolutely necessary.

To exclude evidence indiscriminately on both sides, is turning fortune loose to do the work of justice : to exclude evidence from one side only, leaving the door open to it on the other side, is a sort of arrangement which, to judge of it in the abstract, could have been dictated, one should have thought, by no other principle than that of determination to do injustice.

Under the technical system, however, not only has evidence been excluded in detail, evidence of such and such a particular nature, in consideration of its nature ; but evidence has even been excluded in the lump, without any consideration of its nature : the whole mass of evidence : whatever evidence might, had it not been for the exclusion, have been delivered on this or on that side.

If it really be not conducive to the ends of justice, to shut the door on either side against evidence, against all evidence in the lump, without knowing what it is ; to shew, in any instance, that by this or that arrangement in any established system, a door has thus been shut in this way against evidence, is to shew that

the arrangement in question is repugnant to the ends of justice. Thus to class it, is to condemn it; to condemn it, and on the surest grounds.

In one of two senses given to it, the word *conclusive*, as applied to evidence, seems in a manner peculiar to English law: the reason will appear presently.

In one sense, it puts no exclusion upon evidence of any sort. Evidence thus spoken of as conclusive, may be said to be spoken of as conditionally conclusive: conclusive *prima facie*: conclusive *nisi*.

In another sense, it puts an exclusion upon evidence: upon all evidence on the other side. Not to speak of *real* evidence; not to speak of other circumstantial evidence; it pronounces all witnesses on the other side liars: all witnesses, be they who they may, and in whatsoever number. In this sense, the absurdity of the propositions of which it makes the leading term, the rashness, the inutility, the mischievousness, of all decisions grounded on them, is, when once stated, too evident to be proved. It pronounces some fact or other impossible. Is it then really impossible? What probability, then, is there, that it will be not only asserted by a witness, but also credited by the judge? Is it not impossible? Then why will you pronounce it so?

Evidence spoken of as conclusive in this sense, may be said to be spoken of as *absolutely* conclusive. Evidence absolutely conclusive, is that to which the effect is given of putting an exclusion upon all counter-evidence.

The question concerning conclusive evidence,

whether this or that lot of evidence shall be treated as conclusive, regards *species* of evidence: it regards the propriety of laying down a *generic*, or (as on this occasion we may term it) a *specific* rule, pronouncing that the truth of the sort of fact shall be inferred by the judge, as often as any evidence of the *sort* in question is produced. It regards, I say, the *genus* of the lot of evidence: for as to the *individual* lots, no decision is, or ever can be, grounded on any lot or body of evidence, but that lot or body of evidence is treated as conclusive with relation to the individual suit in hand.

But in so far as the lot under consideration is no more than the individual lot, the question whether it shall be conclusive or no, has no place in any book of jurisprudence; in any book in which, from the decisions pronounced in individual cases, the author takes upon himself, in the way of abstraction, to deduce general rules.

1. If the mass of evidence be made conclusive *absolutely*, observe the consequence. The nature of this will vary, according as the suit is of a penal nature or of a non-penal nature; and in each case, according as the side, in favour of which the evidence is thus made conclusive, is that of the plaintiff, or that of the defendant.

Let the mass of evidence thus rendered conclusive, be composed (suppose) of the concordant testimony of two persons, — two witnesses exhibited on the same side.

In the penal branch; to render the testimony of any two witnesses in this way conclusive absolutely against the defendant, — to force the judge to convict a defendant upon the testimony

of two witnesses, whether it does or does not produce in his mind a persuasion of the fact of their delinquency, whether the testimony thus exhibited appears to him correct or not, veracious or not,—is as much as to give to any two ruffians a power to ruin any individual whatever, or any number of individuals, at their choice, in point of property, person, reputation, or life, as the case may be.

In the penal branch, again; to render the testimony of any two witnesses conclusive in this same way in favour of the defendant,—to force the judge to acquit him, in consequence of the want of such evidence to convict him, (believing him at the same time, as above, to be guilty),—is as much as to confer on any two hireling perjurers a power to give a virtual pardon; to give, even beforehand, a certainty of impunity to any malefactor at their choice, to any number of malefactors at their choice, whatever be their crimes.

In the non-penal branch; to render the testimony of any two witnesses conclusive in this same way in favour of the plaintiff,—to force the judge, on the ground of such testimony, to confer on him the right he sues for, (the judge at the same time not believing him possessed of any good title to such right),—is as much as to confer on any two, and every two, hireling perjurers, a power of conferring a proprietary right of any kind upon any individual at their choice, or any number of proprietary rights of all kinds, and with reference to all subject-matters, upon any number of individuals at their choice: and thereby to impose upon any

individual the obligation correspondent to such right: to impose, therefore, upon any number of individuals, the obligations respectively correspondent to all manner of proprietary rights with reference to all manner of subject-matters.

In the non-penal branch, again; to render the testimony of any two witnesses conclusive in this way in favour of the defendant, — to force the judge, on the ground of such testimony, to refuse to the plaintiff the right he sues for, (the judge at the same time believing him possessed of a good title to such right), — is as much as to give to any and every two hireling perjurers, a power of debarring any individual, or any number of individuals, at their choice, from the acquisition of all such rights, however necessary to their existence, for the acquisition of which the law has made it necessary for them to obtain the decision of a judge: to exempt, accordingly, any individual, any number of individuals, at their choice, from the obligations respectively correspondent to those rights; *i. e.* by the imposition of which, and not otherwise, those rights would be conferred.

Away with all exaggeration; begone all false conceptions, on a ground on which so much depends on truth and accuracy. A power is one thing; a license is another. Of a power, the virtue is, to enable a man to produce the effect in respect of which he is empowered: of a license, the virtue is, to exempt him from punishment, in the event of his producing such effect. To give to the two confederates in question the power of producing all these per-

nicious effects, would be the result of any such rules as these respectively contended against: to enable them to produce those same effects with certainty of impunity to themselves, is not among the results of any of those respective rules. For, by the supposition, perjury is necessary, in each case, to the production of the corresponding mischievous effect: and from the punishment (whatever it be) that happens to be attached to perjury, no exemption is given by any of these rules.

Of the sort of license in question, in addition to the power, what would be the consequence? The utter destruction and subversion of political society in any community in which it should be established: the ruin of all innocent persons; the impunity and triumph of all malefactors: the ruin of all persons having a title, in each case, to the rights sued for; the exaltation of persons having no such title.

2. Where the effect of the rule is not to render the mass of evidence in question conclusive absolutely, but only conclusive *nisi*, the mischief is not so great; yet still the effect, if any, is mischievous, and it has no sort of advantage, in any shape, to help to balance it. It is only in default of evidence on the other side, that the certainty of prevailing is bestowed upon it. But in the case where this certainty takes place, what is it that truth and justice get by it? Here are two pieces of evidence, each of them susceptible of an infinity of degrees of persuasive force; each of them susceptible of the lowest degree. Both together, the degree of persuasion they would be productive of, in the conception of the judge, is not beyond the

second degree in the scale of probative force : \*— comes the rule, and forces him to act as if the degree of his persuasion were at least somewhere above the middle of the scale. The evidence appears false to him ; and he is obliged to act as if it appeared to him to be true.

One class of cases there is, and that a most extensive and important one, in which it may appear, that evidence, circumstantial evidence, of this or that description, is built upon as conclusive, and even absolutely conclusive ; and that with perfect propriety and good effect. This is the case of those acts which, in consideration of their connexion with some principal act, obnoxious on its own account, and on that account put upon the list of crimes, are, therefore, (though in themselves, and were it not for that connexion, not obnoxious,) also put upon that list : as in the case of those clusters of offences (each composed of a principal offence and an accompaniment of accessory offences) which come respectively under the titles of forgery, coining, smuggling, and the like.

But, in these cases, the truth (as upon a closer inspection will appear) is, that no such conclusion is really formed : or at any rate, that, to warrant the course taken by the legislator, it is not necessary that any such conclusion should have been formed. Of him, by whom an act of the description of the accessory act in question is performed, it has been deemed probable by the legislator, that an act of the nature of the

\* See Book I. THEORETIC GROUNDS, Ch. vi. *Degrees of probative force.*

principal act, has been, or was to have been, performed; or that he has been, or was to have been, in some way or other, assistant to the enterprise of him by whom such principal act has been committed. But the propriety of the treatment, in the extent thus given to it,—in the extent by which it embraces the cluster of accessory acts in question,—depends not altogether upon the rectitude of the inference. Whatever be men's views, in the performance of the accessory acts thus converted into offences, the legislator is warranted in converting each of the acts in question into offences, if so it be, that the prejudice (if any) that results to the agents in question, and others, from their non-performance, is not equal to the advantage gained by the check thus applied to the principal offence.

Hence it is, that, in point of propriety, any conclusion thus formed rests on very different grounds, according as it is formed in the station of the legislator, or in that of the judge. Formed by the legislator, it is not necessary that it should be true in every individual instance: it may not be necessary that it should be true in so much as a majority of individual instances. Formed by the judge,—formed, that is to say, with such effect as to have served for the foundation of a general rule of jurisprudential law,—it is productive of mischief, if there be but a single instance in which it is not true: it is productive of mischief, at any rate, in that one instance. Why? Because the individual in question had no warning to abstain from the act:—like most other rules of jurisprudential law, it falls upon the victim

with the weight, and is attended with the barbarity and iniquity, of an *ex post facto* law.

If the evidence, which, in the cause in hand, it is proposed to consider as conclusive, is evidence that has been exhibited, not in that same cause, but in another cause that has no relation to it,—the impropriety of the regulation is still more enormous. Of the inference drawn from a lot or mass of evidence in any preceding cause, no use, no mention ought to be made in any succeeding cause. Here, not only is mention made of it, but the judgment then passed upon it is made to command the decision, in such manner as to prevent the subject from being so much as viewed at all in its own proper lights. In the one case, extraneous matter is mixed with the proper matter, the proper matter not being excluded: in the other case, not only is the extraneous matter admitted, but, in consequence of that improper admission, the proper matter is excluded.

The case of conclusive *evidence* must be distinguished from the case of conclusive *decision*. The case in which the decision in question is considered as being commanded by the *evidence* already adduced, must be distinguished from the case where the decision is considered as being commanded, not immediately by any document of the nature of evidence, but by a document of the nature of a *decision*; a decision already pronounced: pronounced, whether in the same court or in any other court: if in any other court, whether in a court acting under the dominion of the same sovereign, or in a court acting under the dominion of a foreign sovereign.

Such is the distinction which has been rendered requisite by the inaccurate genius of technical nomenclature. For the purpose here in question, decisions, decisions of other courts, are spoken of under the name of evidence.

Supposing the decision of the other court in question to have been grounded on evidence received on both sides; it follows, that, from the admission of such decision as conclusive, in regard to the facts on which it was grounded, no such absurdity, no such mischief, follows, as from the giving to evidence itself, on one side, a conclusive, and thence an exclusive, effect.

On what occasions, and on what grounds, may it be proper for one court to allow (*viz.* with regard to the question of fact) this authority to the decision of another? A question alike curious and important; which belongs not, however, to the present head, but to that of *makeshift* evidence.\*

There is one case in which, in the absolute sense, the term conclusive may be employed with propriety, and yet the evidence upon which the exclusion is put by such conclusive evidence, cannot with propriety be ranked under the denomination of counter-evidence. This is, where, on the ground of evidence in its own nature insufficient and inconclusive, appearing on one side, a sort of practical conclusion is built in favour of that same side, to the exclusion of all such evidence as might have been adduced on that same side. In the sort of case here in view, no exclusion is put upon any evidence on the other side; no ex-

\* Vide Book VI. MAKESHIFT, Ch. ii. Sect. 3.

clusion is put on any evidence characterizable by the appellation of counter-evidence. Why? Because the circumstances in which the practical conclusion in question is drawn are such, that a conclusion of that sort must be made at a time when it is impossible as yet to know whether that side of the cause does or does not afford any counter-evidence.

The case in question is this: for the sake of simplification, take (as being the more common case,) the case where it is on the plaintiff's side that the insufficient evidence is thus conclusive. The plaintiff, using the forms prescribed by the technical system, gives commencement to a cause, say a criminal one. On the defendant's side, the time being come in which, in the track marked out for defence, something should have been done by him, nothing in fact is done. In the state of things thus described, judgment of conviction is pronounced, or some grievous load of vexation imposed, on the defendant; the plaintiff, although able, neither being required nor admitted to establish the fact of delinquency by any better evidence.

In this case, the evidence (such as it is), on the ground of which the burthen in question is imposed upon the defendant, belongs to the head of circumstantial evidence. It consists of two distinguishable lots, or evidentiary facts:—first evidentiary fact, the step taken, or progress made, by the plaintiff in his suit: second evidentiary fact, the negation of the step in question (the step made necessary to defence) on the part of the defendant. To these two evidentiary facts, corresponds, in the character of

the fact evidenced, the delinquency of the defendant in respect of the offence charged.

This kind of circumstantial evidence never is, in point of reason never can be, of itself sufficient to support any such practical inference. Why? Because, if the defendant be really guilty, it is impossible but that some better, some more apposite and direct evidence, at any rate some ulterior evidence, must be to be had.

But the authors of the technical system have found their convenience in putting it into the power of any man in the character of a plaintiff, to put any other into a state of conviction, or into a state tantamount to conviction, on the ground of this flagrantly insufficient evidence: having their reasons for not requiring, nor so much as admitting, better or ulterior evidence, even when direct evidence of the most completely satisfactory description is to be had.

This abomination, the result of the most barbarous iniquity or the grossest stupidity, has been adopted by every existing modification of the technical system; and, in every country, it covers a prodigious (though every where a variable) extent in the field of judicature.

But, in the exclusion thus put upon evidence, nothing, we see, that can with propriety be spoken of under the appellation of counter-evidence, is comprised. Suppose all that evidence, that direct and satisfactory evidence, which is thus excluded, suppose it all delivered; there could not perhaps, (or at least would not), in that stage of the cause, be delivered any counter-evidence, any evidence, on the defendant's side: on the part of the plaintiff,

whether the defendant knows as yet what has been done against him, what he knows, where he is, or whether he even exists, is not as yet known.

The fact inferred in these cases is, non-existence of evidence on the defendant's side, and thence non-existence of right.

The inference, considered as being (what it is) a sweeping and all-comprehensive one, is big with injustice.

Every where there are two states of things, the existence of which, in the character of the efficient causes of the failure, is at least not less probable than the non-existence of evidence: *indigence*, want of the means of self-defence in the judicial field; *want of notice*, viz. want of knowledge of the obligation by which the party is urged to bring those means into action.

*Want of notice* is the but too natural and looked-for result of the contrivance employed by the genius of chicanery, for preventing the means employed, under the notion of conveying notice, from being productive of that effect.\*

In regard to *indigence*; to estimate the comparative probability, as between this state of things, and the consciousness of the non-existence of evidence, and thence of title,—in the character of causes of failure in respect of the taking on the defendant's side the steps requisite for the continuance of the cause; say thus:—Of the whole number of inhabitants in the country in question (England); as the

\* See Book III. TECHNICAL SERIES about Notice.

number of those who are not able respectively to command, in addition to the sum requisite for their subsistence for and during the continuance of the cause (say a twelvemonth), the least sum sufficient for the carrying it on on that one side (say 30*l.*), is to the remaining number,—so is the probability that the failure is the effect of indigence, to the probability of its being the effect of the non-existence of evidence, and consequently of right, on that same side.\*

\* A judge by whom a cause is decided without his knowing any thing about the matter,—what need, it may well be asked, has such a judge to hear evidence? But that is the very way in which causes in general, causes between man and man, are, the greater number of them, decided by learned judges. A piece of paper or parchment is provided; the hand of the judge is applied to it; the mind of the judge is not applied to it. So strictly true is this, that by an intoxicated judge, if he had but sense enough left to write his name, the business might be done exactly as well as by a sober one: by an automaton judge, a judge made of brass and iron, as well as by either. Exaggeration? Not it, indeed: nothing but the very simple truth. Stript of the tinsel with which it has been bedizened all around by interested idolatry, by unblushing hypocrisy, and prostrate admiration, the technical system presents in all its parts enough to stagger belief, and make a man doubt the reality of the objects spread out before his eyes.

By what is it that in these cases the judgment is governed? The circumstances, the exigencies, and abilities of the parties? Alas! no: but by the single circumstance of time. The time is up; the time which the defendant's attorney had, to deliver in at an office some scrap or other of accustomed nonsense: that time is up, and the time for the judge to set his name to a writing, without reading it, is come. What then? And is no mind at all ever applied to the fatal parchment? O yes: a mind is indeed applied to it; but whose would you imagine? Not the judge's, but an attorney's. And in what way employed? In discovering truth? No; but in computing time. An attorney?—and what attorney? The attorney of the party (of the plaintiff) in whose favour the judgment is thus

The mischief being thus brought to view,—the nakedness of iniquity, official and professional,

pronounced: it is the party who, by his attorney, is thus made judge in his own cause. Is the decision too prompt, too favourable? So much the better; that makes another cause; a cause of the sort of those that are commenced by motion, and carried on by affidavit evidence: in a word, a motion cause. Awakened by the chink of fresh fees, it is now, for the first time, that the ears of the judge are really open to the cause.

When, in a great majority of causes, the property and liberty of the subject are thus disposed of, by a set of men, none of whom so much as profess to know any thing about the matter; when the decision is determined, not by any account of human feelings, but by lapse of *time*;—by whom should the judge be made? Not by that first magistrate, whose mind is the fountain of honour and of justice; not by the king, but by Jaques Droz or Maillardet, in concert with Bolton and Watt. By the artisan in clockwork, to make each separate judge; by the artisan in steam engines, to give dispatch and uniformity, where both are as yet unknown, by causing judgment to be signed in any given number of courts at the same time: in as many as Westminster Hall could be made to hold, in addition to the four by which, for so many ages past, it has been enlightened and adorned.

This mechanism, would you view it in a true light, and without disguise, as the works of a watch are examined by the artist, when taken out of the gold and jewels in which they were embedded? Transport it in idea to some undignified tribunal: to the office of a justice of peace, or to a court of conscience. Conceive the magistrate, whose character depends not upon his rank, but conduct,—conceive this unlearned judge copying the pattern set him by his learned superordinates, and, like them, signing judgment and enforcing execution, without having heard the parties, or knowing any thing more of the cause than if the scene of it had been at the antipodes. Behold, in imagination, such conduct; consider what you yourselves would think and say of it: exactly what would be thought or said of it (at least said of it) by those very superiors, who in that station would be as sure to punish it, as in their own to practise it.

Conceive those shopkeeping judges, who, instead of equity on their lips, sit with conscience in their hearts,—conceive

being uncovered,—the remedy is almost too obvious to admit mentioning. Render not to the plaintiff in any case the demanded service, till after he has, on his part, produced appropriate evidence, of some sort or other, in support of it. Is it out of the mouth of his antagonist the defendant, that the evidence, or an essential part of it, must come? Though in this case it is out of his power to produce that evidence, at the worst he may produce (though it be out of his own lips alone) evidence that shall be sufficient to satisfy the conscience of the judge, in such manner as to warrant him in subjecting the defendant to whatever vexation may be necessary for extracting from his lips (or, in case of necessity, from his pen) the evidence alleged to be necessary for the final substantiation of the demand.

Obvious and effectual as is the remedy, the bar opposed to it is no less so. It supposes one party at least to be heard, and heard at the outset of the cause. But that neither party shall be heard (especially at that stage), is of all established principles the most inviolable: a principle, the violation of which would reduce Westminster Hall to a heap of ruins. It would leave prisons empty: it would lead captivity

them, instead of consulting the feelings and weighing the necessities of the parties, lest forty shillings, extracted at once, should consign to ruin a family which a respite of a week or two might have saved,—conceive their conscience manifesting itself in the mechanical signature of judgments with shut doors, while the parties, unheard and unthought of, were, for their benefit, paying their way through the surrounding offices, like half-starved flies crawling through a row of spiders.

captive: it would render offices neither worth selling nor worth giving: it would bring the greater number of suits to an untimely end, and leave the remainder not worth the continuance.

Confined to the *viles animæ*,—to the souls too wretched to yield fees,—the creatures to whom it would be beneath the dignity of law or equity to do justice,—the experiment was endured, the rather as it could not be prevented. Extended to those for whom alone that justice was made that is worth rendering, it would be subversive of the very ends of judicature.

It was observed above, that, in one sense, no exclusion could be said to be put by this arrangement: no exclusion put upon evidence on one side, as where an article of evidence produced on the other is made conclusive.

On one side alone, true it is that by this arrangement no exclusion is put upon evidence. Why? Because the exclusion that is put involves the evidence on both sides: in a word, all evidence. On the defendant's, because either he has had no notice, or it is out of his power to profit by it: on the plaintiff's, because, having done the needful, having run the gantelope through the offices, he is excused from giving evidence, lest he should have none to give.

Why should evidence be received? What is there to be got by receiving evidence? If any thing, what is scarce worth stooping for. What is there to be got by receiving that which is not evidence? Look to those *arcana imperii* that have been divulged by the treachery of false brethren: look to the lists of fees.

SECT. II.—*An article of evidence may with propriety be made conclusive for the purpose of an incidental decision.*

A DISTINCTION requires to be made in regard to the stage of the cause, the stage to which the evidence in question applies.

The case in which this disguised exclusion is absurd and mischievous, is the case where the fact to which the evidence is applied is the principal fact (or among the principal facts) on which the demand or the defence is grounded, —the matter of fact upon which the ultimate decision has to pronounce; and the decision to be grounded on that fact is also an ultimate decision, as above.

Very different may be the case, where the decision to be pronounced is no more than an incidental decision; and the conclusion to be drawn, a conclusion by which such incidental decision shall be warranted. In this case, and for the purpose of grounding such incidental decision, frequently indeed does it happen, that this or that article of evidence may be treated as conclusive; this or that fact may, in the quality of an evidentiary fact, with relation to this or that other in the character of a principal fact, be treated as conclusive.

Such is the case, wherever, upon the application of one party, a decision is pronounced, a judicial act done as of course, upon an *ex parte* representation, no opportunity of contesting the truth of it having been given to the other: as where, upon a representation made by a person saying that goods of his have been stolen, and

(as, from such and such circumstances, he suspects) by Titius, a warrant is issued for the arrestation and provisional confinement of the supposed thief.

For the purpose of an *ultimate* decision, pronouncing Titius guilty of the theft, this evidence is not deemed conclusive: for the purpose of the *incidental* decision, pronouncing the guilt of Titius to a certain degree probable, (to such a degree as to warrant his arrestation and confinement, for the purpose of judicial inquiry), this same evidence is deemed conclusive: and it is even made *absolutely* conclusive; for, by the nature of the measure taken, all faculty of combating the proposed decision by counter-evidence exhibited antecedently to the delivery of it, is taken away.

To the purpose of an incidental decision of any sort, evidence of any description may be treated on the footing of conclusive, absolutely conclusive, evidence exclusive of all counter-evidence, — where the utmost mischief producible by the exclusion is outweighed by the advantage produced by the decision in relation to the several ends of justice.

Thus, in the case just mentioned, the price paid for the advantage consists in the vexation (and that commonly attended with expense) produced by the restraint thus put upon locomotive liberty: the advantage itself consists in the security afforded for the forthcomingness, and thence for the justiciability, of the supposed thief. Give him the opportunity of contesting the necessity, and thence the propriety, of his confinement (the provisional and temporary confinement); if he is innocent, he will come in

and contest it; but if, being guilty, he apprehends the proof will be strong enough for his conviction, he will make use of the summons as a warning not to comply with the requisitions of justice, but to elude them, and make his escape.

To a certain degree, every step on one side, which, on pain of greater inconvenience, calls for any step to be taken on the other side, is productive of vexation: for in judicial procedure every step that is taken is attended with vexation. In every instance, therefore, the evidence to which this effect is given, is, to a certain degree, productive of that sort of ill consequence which is attached to the giving it the effect of conclusive, and thereby of exclusive, evidence. If, instead of a warrant for arrestation directed to a minister of justice, a simple summons addressed to the suspected thief, and requiring his attendance, had been employed, the vexation would have been lessened indeed, but it would not have been done away: and so far as this minor vexation is concerned, the giving this effect to the evidence would have been productive of that sort of ill effect which is produced by the employing any lot of evidence in the character of conclusive, and thence of exclusive, evidence. But be the vexation what it may; if it be productive of preponderant benefit, and if, at the same time, the quantity of it be the least that it can be made, consistently with the production of that benefit,—it will always be warrantable.

By this observation we are led to the practical caution, never to give to any lot of evidence the quality and effect of conclusive evi-

dence, till, in respect of persuasive force, it has been rendered as strong as it can be rendered without the production of preponderant vexation, or other inconvenience, viz. to the person from whom the evidence is required: which is as much as to say, not to impose upon either party (in particular upon the defendant) the necessity of taking any step, or ulterior step, in the cause, without the other party's (the plaintiff's) having antecedently been made to produce whatever evidence he is able to afford without preponderant inconvenience.

General rule.

For the purpose of commanding an interlocutory decision, in what cases shall any (and what) lot of evidence be regarded as conclusive? Answer: In such cases in which the certain mischief, in the shape of collateral inconvenience by vexation, expense, and delay, attached to the receipt of counter-evidence, with the consequent discussions, would be greater than the contingent mischief, in the chance of direct injustice, incurred by the chance of untrustworthiness (understand proveable untrustworthiness) produced by the absence of the light that might have been thrown upon the subject by the excluded counter-evidence.

Such is the general description of the cases in which the exclusion of counter-evidence, in opposition to evidence for grounding an interlocutory decision, may be proper. To the propriety of the principle, no objection seems likely to be made. How, in each instance, to determine whether this or that particular case comes within this general description, is a problem,

the solution of which threatens to be attended with considerable difficulties.

But though it is not possible to lay down any general rule, indicative of the cases in which a certain portion of evidence may, for the purpose of an interlocutory decision, be treated as conclusive, and counter-evidence excluded; it is not difficult to point out two cases at least, in which it cannot, without impropriety, be so treated: viz. 1. if the interlocutory decision is liable to be productive of irreparable damage; 2. if the decision, apparently on an interlocutory point, have the effect of a decision on the main point.

SECT. III. — *Aberrations of Roman and English law in this respect.*

IN the Roman law I do not observe any traces of evidence regarded as conclusive in the improper sense.

To a hasty glance, the suppletory oath and the expurgatory oath wear somewhat of the appearance of it. Examined more closely, they seem not, either of them, to be productive of any such effect. The suppletory oath is admitted in default of other sufficient evidence on that side; and does not command the decision, does not put an exclusion upon any evidence on the opposite side. The expurgatory oath (on the defendant's side) is not called for or admitted, till after the plaintiff has had full liberty to adduce whatever admissible evidence he can obtain on his side.

In all these cases, the testimony in question

is admitted in default of more satisfactory evidence, and is not understood to put an exclusion upon any other evidence.

In all these cases the arrangement is abundantly improper. But the cause of the impropriety has already been indicated in another place: it consists in the want of scrutiny: it belongs not to the present head.

In English jurisprudence there is one remarkable case, in which the effect of conclusiveness has been given to a mass of evidence: this is the case of *wager of law*. The conclusive operation is confined to the non-penal branch of the law: it operates on the side of the defendant, and of the defendant only. On the other hand, the conclusiveness of it is *absolute*: and after all these reductions, the effect of it in practice is as pernicious, as it is absurd in principle: and from the degree of mischief of which it has been productive on this narrow ground, a sort of anticipation may be formed (how inadequate soever) of the mischief of which it would be productive, were the ground it covered more extensive.

In former days, when the practice called *wager of law*, that of a man's *waging his law*, was in use, the manner of it was this:—The demand on the part of the plaintiff having been exhibited in the accustomed form, the defendant, if he thought proper, was at liberty to exhibit himself in open court, to go through the ceremony of an oath, and, under favour of that sanction, to deny the justice of the claim, in terms altogether general, prescribed by a

• Blackst. Comm. B. III. Ch. xxii. pp. 341—348.

formulary of the same tenor in all cases. No details called for or permitted; no other witnesses called for or permitted on that side; no faculty of cross-examination allowed to the adverse party, the plaintiff. A certain number of fellow-swearers were, indeed, not only admitted, but called for on his part. Swearers, but to what point? Not to any particular fact belonging to the case, but merely to the general and irrelevant fact, the *opinion* (a favourable opinion) respectively entertained by them in regard to the veracity of the party by whom they were thus produced. To whatsoever evidence of the direct kind the cause might happen to afford,—circumstantial evidence, and that of the most vague and inconclusive kind, evidence of character, was substituted.

So much for the absurdity: now comes the mischief.

Two sorts of claims were originally infected by this debilitating plague: 1. the sort of claim made by what is called an action of *debt*, a demand of a sum of money, a demand of the non-penal kind, by which the plaintiff, in making his application to the judge, called upon him to impose upon the defendant the obligation of conferring on the plaintiff the property of a sum of money liquidated in amount, payable of course in coin, of which the individual pieces were determinable by the defendant's, the intended collector's, choice: 2. the sort of claim called an action of *detinue*. In *debt*, the thing claimed was a mass of money: liquidated in value,—not liquidated, but (as in such case is necessary) left to the option of the debtor, in respect of the individual pieces of which the

sum of money was to be composed. In *detinue*, the thing claimed was an individual article, of the moveable class: a horse, a piece of furniture, a picture, a trinket, and so forth.

By a conceit, of the number of those which, in the manufactory of legal decisions, occupy the place of reason, the effect of the wager of law on actions of debt, has, in one way or other, been got rid of. In some cases it was put aside; and in other cases, to which the pretence for putting it aside did not apply, another sort of action, an action with another name, was fabricated; an action to which, at the same time, and in this view, the wager of law was pronounced inapplicable. I mean the action of *indebitatus assumpsit*; which is the same thing as the action of debt, in other words. A promise, indeed, to comply with the obligation, is alleged: but the promise is presumed; that is, where there is none, feigned: averred by an assertion wilfully false.

The consequence is, that the demand of a sum of money is tolerably well cleared of this ground of defence by perjury and injustice. Relief is given, justice is administered, in a manner little, if at all, different from that in which it would be administered if the conclusive species of evidence in question, the waging of a man's law, were not applied to this case. The action, called an action of debt, is thus far spoilt; but in so far as it is spoilt, another action is given which answers the same purpose.

Far from being alike innocent is this remnant of ancient barbarism, in the case where the subject of the demand is a specific material object. In this case, the remedy originally

provided is the species of action called the action of *detinue*. By the same baleful influence by which the action of debt is spoilt, as above, this action is spoilt also. In the case of the action of debt, for the part thus spoilt, a succedaneum (as we see) has been provided: in the case of the action of *detinue*, no such succedaneum has been provided; and the damage has continued for so many centuries unrepaired. Upon the principle of analogy, nothing was more obvious, nothing would have been more easy, than the repair. For the purpose of compelling the delivery of money where due,—to the fact of the obligation, you added, in the way of fiction, another fact, a promise to fulfil it: why not for the purpose of compelling the delivery or re-delivery of a specific article? Yes: analogy is the grand source and instrument of invention, in this as well as every other line: but to apply it usefully,—to apply it steadily, comprehensively, and consistently, belongs to none but an inventive mind.

The action of *detinue* is spoilt: another action, called an action of *trover*, is given in the room. But by this new device, unfortunately, the purpose is not answered: a blunder is made, and, instead of the specific thing which is a man's due, damages are given: that is, a sum of money, according to the value, which, on the ground of the imperfect data that are commonly exhibited to them, the judges of fact think fit to put upon it: the remedy, instead of that which belongs to the action of *detinue*, is the remedy that belongs to the action of debt.

Whence came the blunder? Not from a regard, a more scrupulous than consistent regard, to truth. A falsehood is called in; a proposition is assumed, and a proposition more uniformly false in this case, than in the case of the *indebitatus assumpsit*. The story is, that the article claimed by the plaintiff has been *found* by the defendant: found by him, and by him converted to his own use. Thereupon comes the action, calling upon the judge to cause to be delivered to the plaintiff, not the thing that belongs to him, but a sum of money in lieu of it. The defendant takes note of the price thus put upon it: if it is more than he chooses to give for it, he restores it: if less, (that is, if it be any advantage to him to keep it,) he keeps it. The plaintiff pockets the money and the injury: the defendant triumphs in improbity, under the protection of the law. There are things, the value of which to a feeling heart is beyond all price: these are precisely the things which the law abandons to the wrong-doer, and to all wrong-doers.

There is a remedy in kind, indeed, to be had in some cases, in that sort of a court which is called a court of equity. But the optics of a court of equity are too high-seated to spy little things: and a mass of value equal to the expense of more than a year's subsistence to an individual of the most numerous class, is set down by every court of equity to the account of little things.\* So much for the remedy

\* £10. Call the yearly expense of a family £50., and give five to a family; this gives, for the expenditure of an individual, £10.

itself, and the cases in which it is to be had at any price: and as to the price that is to be paid for it (that is, for the chance of it) in time and money; where law reckons by months, equity reckons by years: where law reckons by crowns, equity reckons by pounds.

So delectable is this institution (the wager of law) in the eyes of Lord Coke, that he seems to pride himself in his country's exclusive possession of it.\* Its merit consists in what? In this, that it does (he says) no harm. Why? Because, for the same demand, though there be one sort of action (an action of debt) which is clogged with this appendage, there is another (an action *on the case*) which stands clear of it. Wherever it has no effect at all, there, and there only, it has no bad effect. Unhappily, the reason given for the supposed harmlessness of an institution confessedly useless, is not true in fact. For, notwithstanding the silence of this arch-lawyer on the subject, another sort of demand there is, as we have seen, to which that clog does apply; and which being spoilt by it, and having no succedaneum, leaves the subject without a remedy.

In regard to this institution, of which the highest supposed merit is that of doing no harm, while its real character is that of operating as a denial of justice,—the matter of triumph to Lord Coke, that no other country has the like, Blackstone† shews to be very far from well grounded.

\* "This, for ought I could ever read, is peculiar to the law of England, and no mischief ensueth hereupon."—2 *Inst.* 45.

† *Comm.* III. 341.

An institution that is peculiar to England, or nearly so, is cross-examination in non-penal causes. By neither of these professed panegyrists has this truly honourable peculiarity been noticed: by neither of them has it been observed, that it is by the exclusion this unnatural institution puts upon cross-examination, that the poisonous quality of it operates.

To have been consistent, (if consistency had been a quality capable of adhering to English law, especially at the rude period here in question,) the privilege should have been extended, not to the defendant only, but to the plaintiff; and then the effects of the institution, as applied to the two sides of the cause, being equal and contrary, would have destroyed one another. To the plaintiff (I say) as well as to the defendant: or, if to one alone, rather to the former than to the latter. Why? Because, if for a man to swear falsely to save himself from a loss, is wicked, and in proportion to its wickedness improbable;—to swear falsely, for no more excusable purpose than the obtaining an undue profit for himself, at the expense of subjecting another man to an undue loss, is still more wicked, and in that respect still more improbable.

*[This chapter having been left unfinished by the Author, what follows has been added to it by the Editor. A few paragraphs, which for distinction have been put in inverted commas, consist of fragments, written at different times by Mr. Bentham: for the remainder the Editor is alone responsible.]*

This is not the only sort of case in which

the sworn, but uncrossexamined and self-serving testimony of a party to the suit, is received as conclusive, that is, to the exclusion of counter-evidence. "The practice in chancery," we are informed by Phillipps,\* "invariably is, that a party is entitled only to extracts of letters, if the other party will swear that the passages extracted are the only parts relating to the subject matter."

There is another rule, by which a man's own testimony is rendered conclusive evidence in his favour, and that too on such a subject as that of his own character. The witness indeed in this case is not a party in the suit; but for any thing that appears, he may be the vilest of malefactors; and he is, at any rate, under the influence of an interest, which is one of the strongest of all interests in the bulk of mankind, while even in the vilest it cannot be a weak one. A witness, as we have seen,† is not compellable to answer any question, the answer to which, if true, might tend to degrade his character: if, however, he chooses to answer, the party who asks the question is bound by his answer, and is not allowed to falsify it by counter-evidence.‡

\* Vol. i. p. 421.

† Book III. EXTRACTION. Ch. 4. *Discreditive Interrogation*.

‡ In the disapprobation bestowed upon this rule, it is of course implied, that the case is one of those in which the production of evidence to discredit the character of the witness, is in itself proper; for which cases, see Book V. CIRCUMSTANTIAL. Chap. xiii. *Of motives, means, &c.* Sect. 3 and 4. *Character Evidence*. If not, it is proper to exclude any such evidence, after he has answered, only because it is proper to exclude it, whether he answers or no. But if the case be one in which it

The above seem to be the only instances worth mentioning, in which an article of orally delivered testimonial evidence has in English law been made conclusive. The instances in which similar effect has been given to an article of circumstantial evidence are innumerable; and many of them have been already brought to view.

1. As often as a decision has been given against either of the parties in a suit, on no other ground than that of his having failed, at a particular stage of the suit, to perform any operation which has been rendered necessary at that stage by technical rules, to the obtainment of justice; so often has the non-performance of that operation been taken as evidence, and conclusive evidence, of what is called in the language of lawyers *want of merits*, that is, of the badness of his cause.

“Of the justice of the demand, whatsoever  
“it be, that happens to be made upon the  
“defendant, provided the suit does not happen  
“to be called a criminal one, non-resistance  
“on his part is regarded and acted upon as  
“sufficient evidence; and to the plaintiff possession is given of the object of his demand,  
“just as if the justness of it had been proved.  
“Even a lawyer will not pretend that on any  
“ground of reason the inference is a conclusive  
“one. Pecuniary inability, especially under

would have been proper to adduce evidence against his character without putting any questions to himself, it is difficult to see what impropriety there can be in doing exactly the same thing after you have interrogated him and got his answer, if you do not believe his answer to be true.

“ the load of factitious expense imposed every  
“ where by the technical system, is another  
“ cause equally adequate to the production of  
“ the effect. In every part of the empire of  
“ the technical system, and more particularly  
“ in England, this inability will have place in  
“ the case of a vast majority of the body of the  
“ people.

“ If a presumption thus slight were not received in proof of the justice of the plaintiff's  
“ claim, and in the character of conclusive evidence,—if such direct proof of it as were to  
“ be had, were in every instance to be required,—a number of *malá fide* suits, with the  
“ produce of which, the coffers of the man of law are at present swelled, would have no  
“ existence.

“ Thus it is, that under the technical system,  
“ every court calling itself a court of justice  
“ is in effect an open shop, in which, for the  
“ benefit of the shopkeeper and his associates,  
“ licenses are sold at a fixed, or at least at a  
“ limited, price,—empowering the purchaser to  
“ oppress and ruin at his choice any and every  
“ individual, obnoxious to him or not, on whom  
“ indigence or terror impose the inability of  
“ opposing effectual resistance.

“ The real condition in which the great majority of the people, in the capacity of suitors,  
“ have been placed by the factitious expenses  
“ manufactured by the man of law, is an object  
“ too reproachful to him to be suffered to remain undisguised. In this, as in every other  
“ part of the system, extortion and oppression  
“ find in mendacity an ever-ready instrument.

“The real condition in which the suitor has been involved, the misfortune of defencelessness through indigence, is put out of sight: a crime is imputed to him in its stead: and for that crime, not only without proof, but under the universally notorious consciousness of his innocence, he is punished. *Contempt* is the word constantly employed to designate this imaginary crime. The real, the universally notorious, causes of his inaction, are fear and impotence. But a man cannot be punished avowedly for fear: he cannot be punished for impotence: mankind would not submit themselves to tyranny so completely without a mask. Adding calumny to mendacity, they pretend to regard his inaction as originating in *contempt*; and it is on this mendacious accusation of their own forging, that they ground the ruin they inflict on him under the name of punishment.”

In equity, the defendant, who, from his own poverty or ignorance, or the carelessness of his lawyer, is so unfortunate as not to put in an answer to the plaintiff's bill, stands a great chance (if a poor man) of being a prisoner for life. He is committed to gaol for the *contempt*: and as he is not released without payment of fees,—unless he has money to pay these fees, or can find some one else who will pay them for him; he must remain there all his life. Instances of this sort have not unfrequently, through the medium of the newspapers, been presented to the public eye.

2. As often as a contract, or any other

legally operative instrument, is pronounced *null and void*, on account of the non-observance of any *formality*; so often, the sort of exclusion of which we are here treating, has place. A man claims a landed estate, under the will of the last proprietor. The will is produced in court: it is found to have the signatures of two witnesses only, instead of three; or one of the three is proved to have put his name to the will in the absence of the testator: the will is rejected, and the party loses his estate. The rejection of the will may, perhaps, be considered as a *penalty*, for non-compliance with that injunction of the law which requires that certain formalities should be observed. Considered in this point of view, it has been shewn in a previous Book\* to be unnecessary and objectionable. But it may also be regarded as grounded on the presumption that the will was spurious, or unfairly obtained. Here then is this one circumstance, viz. non-observance of legally prescribed formalities, received as conclusive evidence of spuriousness or unfairness. The fallacy of this supposition has also been made sufficiently manifest in the Book already referred to. This article of circumstantial evidence, which is conclusive in law, is so far from being conclusive in reason, that it scarcely amounts even to the slightest presumption, until two things be ascertained: first, that the party *knew* that these formalities were prescribed; and secondly, that compliance with them was in his *power*.

\* See Book IV. PREAPPOINTED.

That spurious or unfair instruments have not frequently been *prevented* by the peremptory requisition of these formalities, is more than I would undertake to say: but an assertion which one may venture upon without much danger of mistake, is, that there is scarcely an instance of any instrument's having been actually *set aside* for the want of them, in which there was not a considerable, if not a preponderant, probability of its being genuine.

3. Almost all *estoppels* are exclusions of the sort now under consideration. You are estopped, say the lawyers, from proving so and so: the meaning of which is, that they will not permit you to prove it. For this they have sometimes one pretext, sometimes another: something which you yourself have said or done; or something which has been said or done by somebody else.

There is a great variety of instances in which they tell you that you are estopped by a previous decision, either of the same court, or of some other court of justice: these have been already noticed under the head of *adscititious evidence*.\* At other times you are estopped by what they term an *admission*. You are said to make an admission, if you say or do any thing, or if any other person says or does any thing for you, which a judge construes as an acknowledgment on your part, that a certain event has happened; that is, any thing from which he chooses to infer its happening: after which, though every body, who knows any

\* See Book VI. *MAKESHIFT*.

thing about the matter, knows that it has not happened, and would say so if asked, the judge, to save the trouble of asking, chooses to act exactly as if it had.

Admissions are of two kinds, express or presumed; and the former are either admissions upon record, or admissions not upon record. It is a rule with lawyers, that no evidence can be received to dispute admissions upon record,\* that is, admissions in the pleadings. If this rule went no farther than to confine the evidence to such points as are actually in dispute between the parties, it would be a good rule. In a law book, a man may reckon himself fortunate if he hits upon a rule which has a reason: if he expect, that where the reason stops, the rule will stop too, it is very rarely that he will not be disappointed. One example will serve as well as a thousand. When a man, against whom an action is brought for a sum of money, denies that the plaintiff is entitled to the whole sum which he claims, but admits that he has a just claim upon him for a smaller sum,—the practice is, for the defendant to pay into court the amount of the sum which he acknowledges to be due, that it may remain in deposit until the cause is decided. This payment, lawyers choose to call an “acknowledgment upon record;” and now mark the consequence: “the party cannot recover it back, although he has paid it wrongfully, or by mistake.”†

As for extrajudicial admissions, it is not always that they are even receivable, when

\* Phillips, i. 159.

† Ib. 175.

they are, they are generally taken for conclusive: for it may be observed, in regard to this part of the law of evidence, as in regard to so many other parts of it, that neither the lawyers by whom it was made, nor the lawyers by whom it has been expounded, ever seem to know that there is any middle course between taking an article of evidence for conclusive, and rejecting it altogether. Accordingly, in reading the *dicta* of judges, or the compilations of institutional writers from those *dicta*, one is continually at a loss to know what they mean. In speaking of this or that evidentiary circumstance, what they tell you concerning it, is, that it is *evidence*: now and then superadding, as it were for the sake of variety, the epithet *good* to the general appellative, evidence. Would you know whether they mean that it is *conclusive*, or only that it is *admissible*? Observe their *actions*: see whether they send it to a jury: for any thing that you can collect from their *words*, they are as likely to mean the one as the other.

The following will serve as an example, as well of the ambiguity of which I have been speaking, as of the sort of logic which passes for irrefragable, under the dominion of technical rules. When a party, interested in the cause, makes an admission against his interest, if he has not made it by mistake, it is nearly the best evidence against him that you can have: *ergo*, it ought to be taken for conclusive against him, when he *has* made it by mistake; *ergo*, the admission of a person who is merely a nominal plaintiff, and who is *not interested in the cause*, ought to be conclusive against the person who is. So, at least, it was decided in the case of

*Bauerman v. Radenius*,\* in which the admission of the plaintiffs on the record, though not the parties really interested, was received as conclusive, and the plaintiffs were nonsuited. I say, received as conclusive; because, when a plaintiff is nonsuited, that is to say, when his claim is dismissed by the judge without going to a jury, it is because, if he had gone to a jury, the jury *must have found a verdict against him*; which would have been a bar to any future prosecution of the same claim: whereas a nonsuit leaves it still in his power to bring a fresh action, after remedying the defect which would have compelled the jury to find against him. The court of King's Bench afterwards *affirmed*, that is, confirmed, the nonsuit: on which occasion Mr. Justice Lawrence said, "The present plaintiffs either have or have not an interest: but it must be considered that they have an interest, in order to support the action; and if they have, an admission made by them that they have no cause of action, is admissible evidence." This judge, here, with much *naïveté*, displays the manner in which, under the influence of technical rules, what is known to be false is taken for true, in order that what is evidently unjust may be done. He knew as well as the nominal plaintiffs knew, that they had *not* an interest in the cause: but what of that? The law knew that they had.

There is an overflow of legal learning, on the question, what effect to your prejudice shall be given to the admission of your *agent*: and here again recurs the usual alternative: it is either

\* *Phillipps*, i. 84.

not received, or it is received as conclusive : it either excludes all other evidence, or it is itself excluded. Thus, in one case,\* “ a letter from the defendant’s clerk, informing the plaintiff that a policy had been effected, was held to be *good evidence* [meaning here *conclusive evidence*] of the existence of the policy ; and the defendant *was not allowed to prove* that the letter had been written by mistake, and that the policy had not been made :” while, in another case,† “ where the fact sought to be established, was, that a bond had been executed by the defendant to the plaintiff, which the defendant had got possession of, the Master of the Rolls *refused to admit*, as evidence of this fact, the declaration of the defendant’s agent, who had been employed to keep the bond for the plaintiff’s benefit, and who, on its being demanded by the plaintiff, informed him that it had been delivered to the defendant.” It might seem to a cursory reader, on comparing these two decisions, either that the predilection of judges for bad evidence was such, that, rejecting an admission in other cases, they were willing to receive it upon the single condition of its being made by *mistake* ; or that, in laying down rules of evidence, blind caprice was the only guide. In this apparent inconsistency, however, there is a principle, though no one would have thought it : it is this : that the admissions of an agent are not to be received, unless “ made by him, either at the time of his making an agreement about which he is employed,

\* *Harding v. Carter*, apud *Phillipps*, i. 97.

† *Fairlie v. Hastings*, *ib.* 95.

or in acting within the scope of his authority." It is not, that what he says on these occasions is more likely to be true than what he says on other occasions: it is, that "it is impossible to say a man is precluded from questioning or contradicting any thing that any person may have asserted; as to his conduct or agreement, merely because that person has been an agent:" and as it would be unjust to preclude him from contradicting it, it is not permitted so much as to be heard.

Besides these express admissions, there is an extensive assortment of presumed ones; when a man "precludes himself from disputing a fact, by the tenour of his conduct and demeanour;"\* the meaning of which is, that the court will *presume an admission* from any thing that a man does, which they think he would not have done if the fact had not been true. This is the principle: but as to the extent of its application, there is no criterion of it except the Index to the Reports. It has usually been applied only to cases in which the presumption afforded by the act is really strong, and might reasonably be held conclusive in the *absence* of counter-evidence, though certainly not to the *exclusion* of counter-evidence, since there is not so much as one of the cases in which the presumption is not liable to fail. Without touching upon the grounds of failure which are peculiar to this or that case, there is one obvious ground which is common to them all. A man's actions can never prove the truth of a

\* See an abstract or digest of the Law of Evidence, recently published by Mr. Harrison, on the plan of Crofton Uniacke, Esq. (p. 8.)

fact, except in so far as his *belief* of it is evidence of its truth: and to hinder a man from proving that a thing did not happen, because at some former period he believed that it did, even if you were sure that he believed it (which in general you are not, it being only inferred from his actions), would be unjust in any case, but is more especially absurd, when the fact in question is one of those complicated, and frequently recondite, facts, which are constitutive of *title*.

Take a few instances.

“ By accounting with a person as farmer of the tolls of a turnpike, a party is estopped from disputing the validity of his title, when sued by account stated for those tolls.

“ By paying tithes to the plaintiff on former occasions, a defendant admits the right of the plaintiff to an action for not setting out tithes.

“ Where a party rented glebe lands of a rector, and had paid him rent, he was not permitted, in an action for use and occupation, to dispute his lessor's title, by proving that his presentation was simoniacal.

“ In actions of use and occupation, when the tenant has occupied by the permission of the plaintiff, he cannot dispute the plaintiff's title, although he may shew that it is at an end.

“ In an action of ejectment, by a landlord against his tenant, the tenant cannot question the title of his landlord; although he is at liberty to shew that it has expired.”\*

In all these instances, the presumption upon which, if upon any thing, the decision must

\* Harrison, *ut supra*, pp. 9, 10.

have been grounded, is, that if the plaintiff had not really had a good title, the defendant would not have paid rent, tithe, &c. to him, as the case may be. To justify the rendering this presumption conclusive, it would be necessary, among a crowd of other suppositions, to suppose that a tenant never paid rent to the *de facto* landlord, without first demanding his title deeds, and going over them with a lawyer, for the purpose of assuring himself that they did not contain any flaw.

4. A whole host of exclusions lurk in the admired rule, that the best evidence which the nature of the case admits of, is to be required: a rule which seems to please every body, and with the more reason, as, having no distinct meaning of its own, it is capable of receiving any which any one thinks proper to attach to it. There is a charm, too, in the sound of the words *best evidence*, which no lawyer, and scarcely any non-lawyer, is able to resist. The following seems to be nearly the train of thought (in so far as any thing like thought can be said to have place) which passes through the mind of the submissive and admiring student, when he hears this maxim delivered *ex cathedra*, as something which, like Holy Writ, is to be believed and adored. Good evidence, it naturally occurs to him, is a good thing: *à fortiori* therefore (it is unnecessary to say), the best evidence cannot but be a good thing: what, however, can be more proper, than always to require, and insist upon having, the best of every thing? How admirable, therefore, the rule which requires the best evidence (whether it is to be had or no); and how admirable the

system of law, which is in a great measure made up of such rules!

As a preliminary to praising this rule, a desirable thing would be, to understand it: for this, however, you have no chance but by looking at the practice: the attempt to find a meaning for the words would be lost labour. The meaning attached to it by lawyers has been different, according to the different purposes which they have had to serve by it. One use which they have made of it, is, to serve as a reason for excluding an inferior and less trustworthy sort of evidence, when a more trustworthy sort, from the same source, is to be had: as, for example, a transcript, when the original is in existence and forthcoming. Applied to this purpose, the rule, if it were not so vague, would be justly entitled to the appellation of a good rule: the purpose, at any rate, (with the limitations which have been seen in the Book on Makeshift Evidence), must be allowed to be a good purpose. Another use which has been made by lawyers, at times, of this rule, is, to enable a judge, at no greater expense than that of calling a particular sort of evidence the best evidence, to treat it as conclusive in favour of the party who produces it; or the non-production of it as conclusive against the party who, it is supposed, ought to have produced it; in both cases putting an exclusion upon all other evidence: and it is in this application of the rule, that it presents a demand for consideration in this place.

“ Take a sample of their best evidence, — of  
“ that best evidence which, by such its *restness*,  
“ puts an exclusion upon all other evidence.

“ Speculative Position or Antecedent;—  
“ Written evidence is better than parol evidence. Practical Inference or Conclusion;—  
“ Therefore, in case of a contract, when there  
“ exists written evidence of it, with certain formalities for its accompaniments, oral evidence  
“ is, or is not, to be admitted, in relation to the  
“ purport of such contract. Is, or is not; which-  
“ ever is most agreeable and convenient to the  
“ judge. Such is the plain and true account  
“ of the matter: for distinctions are spun out  
“ of distinctions; and, the light of reason, by  
“ which they would be all consumed, being  
“ effectually shut out, on and on the thread  
“ might continue to be spun without end.

“ Observe the inconsistency.

“ In English law, circumstantial evidence of  
“ the weakest kind, comparison of hands, by  
“ persons acquainted, or not acquainted, with  
“ the hand of the person in question,—or even  
“ the bare tenour of the instrument, *i. e.* the circumstance of its purporting upon the face of it  
“ to have been executed (*i. e.* recognized) by the  
“ person or persons therein mentioned,—this  
“ circumstance, if coupled with the evidentiary  
“ circumstance *ex custodia*, is (if the assumed  
“ date of the instrument be as much as thirty  
“ years anterior to the day of production)  
“ held sufficient, and, in default of counter-  
“ evidence, conclusive.

“ A dozen or a score of alleged percipient  
“ witnesses, all ready to concur in deposing  
“ that, to the provisions in the instrument mentioned, this or that other had been agreed to  
“ be added or substituted,—shall they be received, and heard to say as much? Oh, no;

" that must not be; it is against our rule  
" about *best evidence*."

The general rule on this subject, is, that oral evidence is not admissible " to contradict, or vary, or add to, the terms of a written agreement."<sup>\*</sup> Cut down as this rule is, by almost innumerable exceptions, there is still enough of it left to do much mischief. The exceptions, if their practical effect be looked to, are reasonable, as narrowing *pro tanto* the extent of a bad rule: in principle, however, there is scarce one of them which is tenable, unless it be first granted that the rule is absurd. It would be difficult, for example, to discover how, in respect of the propriety of admitting oral evidence to shew the abandonment of a written agreement, it should make any difference whether the agreement was or was not under seal; or why, in equity, on a bill for the specific performance of a written agreement, evidence to prove that, by reason of accident or mistake, the written instrument does not correctly express the agreement, should, if tendered by the defendant, be in certain cases admitted; if tendered by the plaintiff, refused. The origin of the exceptions to this rule, as well as to so many other technical rules, is visible enough. They were established by the same sort of authority which established the rules, *viz.* that of judges, deciding *ore tenor*, under the guidance of no principle, but in accordance with the interest or *adieu* of the moment, or frequently with the immediate view of doing justice, notwithstanding technical rules. A judge sees plainly, that, in

<sup>\*</sup> Phillips, v. Hill.

this or that particular case, if he adhere to the rule, he will do injustice; and without daring to set it aside, or even allowing himself to suppose that a rule which had descended from wise ancestors could be other than a good one, he has honesty enough to wish to do justice in the cause in hand, and accordingly cuts into the rule with a new exception for every new instance which presents itself to him of its mischievous operation, taking care never to carry the exception one jot farther than is strictly necessary for his immediate purpose: another judge follows, and takes another nibble at the rule, always upon the same diminutive scale; and so on. Hence it comes, that, at length, after the lapse of a few centuries, the body of the law, considered as a whole, has become a little more just, and a great deal more unintelligible:—while the law books have degenerated from the primitive simplicity of the old text-books, where every thing was comprehended under a few simple principles, (in which, whatever trespasses you might find against justice or common sense, you will find none against consistency,—and which would be perfect, if conduciveness to human happiness were a quality that could, without inconvenience, be dispensed with in law); and have swelled into an incoherent mass of mutually conflicting decisions, none of them covering more than a minute spot in the field of law, and which the most practised memory would vainly strive to retain, or the most consummate logic to reduce to a common principle.

Oral evidence, it seems, is receivable to *explain*, in many cases in which it would not be

receivable to *vary*, the terms of an agreement. The general rule is, that, in case of a *latent* ambiguity,—that is to say, an ambiguity which does not appear on the face of the instrument, but is raised by extrinsic evidence,—extrinsic evidence will be received to explain it : thus, if a testator bequeaths to John Stiles his estate of Blackacre, and it appears that he has two estates known by that name, oral evidence will be received to shew which of the two he meant. Provided always, that there be no possibility of giving effect to the instrument *in terminis*, without the aid of other evidence :\* for if it have a definite meaning, though a different one from that of the testator, it does not signify. When they cannot by any means contrive to give execution to the *ipsissima verba* of the will, then, it seems, they will condescend to inquire what the testator intended.

Not so when the ambiguity is *patent*, that is, apparent on the face of the instrument. In this case, the door is inexorably shut upon all extrinsic evidence ; and if the intention of the party cannot be inferred from the context, “the clause will be void, on account of its uncertainty.” You are unskilled in composition : after making mention in your will of two persons, your brother and your younger son, you bequeath to *him* an estate : in this case it may possibly

\* “The question on the admissibility of parol evidence, in such cases, will depend principally upon this,—namely, whether the evidence is necessary to give an effective operation to the devise, or whether, without that evidence, there appears to be sufficient to satisfy the terms of the devise and the intention of the testator, as expressed on the face of the will.”  
—*Phillipps*, i. 515.

admit of dispute, to which of the two you meant to bequeath it; what, however, can admit of no dispute, is, that you meant to bequeath it to one or other of them: as, therefore, it is doubtful whether you intended that A should have it, or B, the judge will not give it to either of them, but gives it to C, the heir-at-law, whom it is certain you intended not to have it. Or, if he gives it to either of the two persons who, and who alone, can possibly have been meant, he gives it upon the slightest imaginable presumption from the context. There were twenty persons standing by when you executed the will, all of whom knew perfectly well, from your declarations at the time, which of the two parties in question you meant, but none of whom he will suffer to be heard. And this is what lawyers call requiring the best evidence.

For this rule two reasons have been given: one a technical, that is, avowedly an irrational one; the other, one which pretends to be rational. The technical reason is the production of Lord Bacon: it is this: "the law will not couple and mingle *matter of specialty*, which is *of the higher account*, with *matter of averment*, which is *of inferior account* in law." For those to whose conceptions the incongruity of so irregular a mixture might fail to present itself in colours sufficiently glaring, a subsequent lord chancellor brought forth the following less recondite reason; that the admission of oral evidence in explanation of patent ambiguities, "would tend to put it in the power of witnesses to make wills for testators:" an objection which would be very strong against any one mode of proof, if it did not unhappily apply to every other.

All hearing of evidence lets in *some* danger of falsehood. What, however, was probably meant, is, that the admissibility of oral evidence to explain a will, would frustrate the intention of the law in requiring preappointed evidence, a better sort of evidence than oral, and less likely to be false. If this be the meaning, it is enunciated far too generally. It is true that preappointed evidence, considered as a *genus*, is better than oral. But it is not true that every particular article of the former is better than the best conceivable article of the latter. It is not true that the signature of three witnesses is better, *ceteris paribus*, than the oral depositions of twenty. Yet this rule excludes the latter evidence, on the plea of its inferiority to the former.\*

\* "The refusal to put upon the words used by a man in penning a deed or a will, the meaning which it is all the while acknowledged he put upon it himself, is an enormity, an act of barefaced injustice, unknown every where but in English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery.

"Lawyers putting upon it their own sense: yes, their own sense. But which of all possible senses is their own sense? They are as far from agreeing with one another, or each with himself, as with the body of the people. In evident reason and common justice, no one will ought to be taken as a rule for any other; no more than the evidence in one cause is a rule for the evidence to different facts in another cause. It is not from this or that word, or string of words, in a will, but from all the words taken together,—nor yet only from all the words taken together, but from all the words, compared with every relevant fact that is ascertainable respecting the situation of his property, of his family, of his connexions, that the intention of the testator is to be gathered.

"To these diseases of jurisprudence, attempts have been made to apply a remedy by jurisprudence. But the at-

Another consequence of the technical maxim, that written evidence is better than parol, (a maxim which, like almost all other general maxims of technical law, is not true in more than half the cases which it extends to), is the exclusion, in a great number of cases, of oral evidence to prove that there *exists* a written document evidentiary of a particular fact. The judges, on the occasion of a reference made to them in the course of the late queen's trial, declared that "the contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence."\* Good: provided always it be a necessary consequence, that a paper is forthcoming, because it is in existence. Upon the strength of this rule, the judges decided, that the supposed writer of a letter could not be questioned concerning the contents of the letter, unless the letter itself were first produced, and the witness asked whether he wrote it. Thus, the only evidence, perhaps, which you have got, and that too of so good a kind as the testimony of a writer concerning what he himself has written, is ex-

"tempt, if not treacherous, has been shallow. The result  
 "never has been, never can be, any thing better than a  
 "further extent given to the application of the *double foun-*  
 "*tain* principle.† No; it is not a case for Telephus with  
 "his spear; it is a case for Hercules with his searing-iron.  
 "Jurisprudence pruned by jurisprudence, is the hydra decol-  
 "lated, and left to pullulate: the only searing-iron is the  
 "legislative sceptre."

\* Phillipps, i. 281.

† See the chapter so intituled.

cluded, because another sort of evidence is not produced, which would be better if you could get it, but which, in all probability, you cannot get. The superior evidence, though not forthcoming to any practical purpose, cannot be shewn not to exist; and it is therefore said to be *forthcoming*, to the purpose of excluding all inferior evidence.

A volume might be filled with specimens of the injustice and absurdity which are the fruit of the rule requiring the best evidence. Take this example among others. A written instrument, with certain formalities, being the best evidence; if, in the written instrument, any one of these formalities be omitted, neither the agreement, nor any other evidence of the transaction, will be received. Thus, "a written instrument which requires a stamp, cannot be admitted in evidence, unless it be duly stamped; and no parol evidence will be received of its contents. If, therefore, the instrument produced is the only legal proof of the transaction, and that cannot be admitted for want of a proper stamp, the transaction cannot be proved at all; as, in an action for use and occupation, if it appear that the defendant held under a written agreement, which for want of a stamp cannot be received, the plaintiff will not be allowed to go into general evidence; for the agreement is the *best evidence* of the nature of the occupation."<sup>\*</sup>

An agreement on *unstamped* paper not being itself receivable, it follows naturally enough, that if it be lost, parol evidence will not be

<sup>\*</sup> Phillipps, i. 436.

received of its contents; nor even if it be wrongfully destroyed by the other party: notwithstanding another technical rule, that no one is allowed to take advantage of his own wrong. But you can never guess from the terms of a rule, to what cases it will be applied.

Take the following still more barefaced piece of absurdity, as a final specimen of the operation of this vaunted rule.

"The acts of state of a foreign government can only be proved by copies of such acts, properly authenticated. Thus, in the case of *Richardson v. Anderson*, where the counsel on the part of the defendant proposed to give in evidence a book purporting to be a collection of treaties concluded by America, and to be published by the authority of the American government; and it was proposed, further, to prove, by the American minister resident at this court, that the book produced was the rule of his conduct; this evidence was offered as equivalent to a regular copy of the archives in Washington: but Lord Ellenborough rejected the evidence, and held, that it was necessary to have a copy examined with the archives."\*

We may expect in time to see a judge arise, who, more tenacious of consistency than his predecessors, will refuse to take notice of the existence of the city of London, unless an examined copy of the charter of the corporation be given in evidence to prove it.

Can any exposure make this piece of techni-

\* Phillipps, i. 382, 383.

cality more ridiculous than it is made by merely stating it?

5. I shall notice only one more instance of the species of disguised exclusion which forms the subject of the present chapter. The sort of evidence which, in this instance, is taken for conclusive, is the species of official document called a record. "Records," says Phillipp<sup>s</sup>,\* "are the memorials of the proceedings of the legislature, and of the king's courts of justice, preserved in rolls of parchment; and they are considered of such authority, that no evidence is allowed to contradict them. Thus, if a verdict, finding several issues, were to be produced in evidence, the opposite party would not be allowed to shew, that no evidence was offered on one of the issues, and that the finding of the jury was indorsed on the postea by mistake." On this piece of absurdity, after what has already been said, it can scarcely be necessary to enlarge. Somehow or other, however, lawyers seem to have found out, that, like every thing else which is human, so even a record, — however high its "authority," and however indisputable its title to the appellation bestowed upon it by Lord Chief Baron Gilbert, "a diagram" (whatever be meant by a diagram) "for the demonstration of right" (whatever be meant by the demonstration of right), — is still, notwithstanding it be written upon parchment, liable to error: for they have found it necessary to determine that a record shall be conclusive proof only "that the decision or judgment of

\* Vol. i. p. 292.

the court was as is there stated," and not "as to the truth of allegations which were not material nor traversable." This is fortunate: the fact of the judgment being one of the very few matters, contained in what is called a record, which, unless by mistake, are generally true. But, however fallible in respect of other facts, in respect of this one fact they hold it to be infallible; and its infallibility, itself needing no proof, supersedes all proof of the contrary; which, therefore, as it cannot prove any thing, it would be loss of time to hear: accordingly it is not heard, but inexorably excluded.\*

\* "We have seen in how many cases the words *conclusive evidence* cover a real exclusion: it remains to bring to notice one case in which they do not. This is when an act, designated by a distinct expression, is termed *evidence* of the same act designated by an indistinct one.

"The clouds in which, partly by imbecility, partly by improbity, the field of legislation has been involved, are, in some places, of so thick a texture, that no small labour is requisite to pierce through them. Even in statute law, the phraseology employed by the professional penman in whom the legislator has reposed his confidence, has, in but too many instances, been so unhappily or so dexterously chosen, as to present no fixed sense, no sense distinct enough for use. In this case, what has been the resource? To describe an act in more distinct terms, to consider it as an act different from the act described in the less distinct terms, and to speak of the unauthoritatively, but more distinctly described act, as evidence of the authoritatively, but less distinctly expressed one.

"Thus, in the case of an offence bearing relation to the police, certain acts have been spoken of as being *evidence* of vagrancy. Stript of its disguise, what, in this case, was the plain fact? That vagrancy was one sort of act, the acts in question another sort? and that, these acts being

“regarded as proved, vagrancy was regarded as a distinct act,  
“the existence of which had been rendered preponderantly  
“probable by the other? No such thing: but the acts in  
“question were determinate, the signification of the word  
“vagrancy, not. What was the consequence? That on the  
“ground of the statute interdicting vagrancy, a rule of juris-  
“prudential law was enacted, interpretative of the statute  
“law: a rule of jurisprudential law, applying to the acts in  
“question the final consequences attached by the statute to  
“the indistinct appellation.”

## CHAPTER V.

OF THE RULE, THAT EVIDENCE IS TO BE CONFINED TO THE POINTS IN ISSUE.\*

THIS rule, though good in principle, is frequently, as it is administered, an instrument of mischief; partly from being combined with a bad system of pleading, partly from the perverse application which has been made of it to purposes for which it was never intended. Being an exclusionary rule, it demands consideration in this place: and the occasion seems a suitable one for taking notice, not of the bad effects in the way of exclusion only, but of the bad effects of other descriptions, which are the fruit of it.

Nothing can be more proper than to exclude all evidence irrelevant to the points in dispute: and if the points in issue on the pleadings were always the points, and all the points, in dispute, nothing could be more proper than to exclude all evidence irrelevant to the points in issue. Unhappily, however, to determine what are the points in dispute, though the professed object of all systems of pleading, is very imperfectly attained even under the best;

\* This chapter has been added by the Editor.

and the points really at issue are often very different from the points *in issue*, as they appear on the pleadings.

In so far as the representation given in the pleadings of the state of the question between the parties, fails to accord with the real state; in so far, at least, as any point (that is, of course, any material point) which is really in dispute, is omitted or mistated in the pleadings; in so far, the rule, which requires that the evidence be confined to the points in issue, those points not being the points in dispute, operates to the exclusion of all evidence which bears only upon the real points in dispute. This includes all cases of quashing, grounded on what is called a *flaw* in the pleadings: as, for instance, the case of a misnomer. If you indict a man under the name of John Josiah Smith, and it turns out that his real name is John Joseph Smith, though nobody has the least doubt of his being the person meant, and though he himself would not have the effrontery to declare upon oath a belief that he was not, it is no matter, the indictment is quashed: because, the only question at issue, as indicated by the indictment, relating to the supposed guilt of Josiah, proof, however convincing, of the criminality of Joseph, is *foreign to the issue*. On the same ground, in an action for non-residence, the designation of the parish by the name of St. Ethelburgh, instead of Saint Ethelburgha, was held to be (as lawyers term it) a fatal variance. On another occasion, the ground of the quashing was, that a party to a bill of exchange had

been called Couch, instead of Crouch : on another, that the prisoner was charged with having personated M'Cann, while the evidence went to shew, that the man whom he had personated was M'Carn. It was not that, in any of these instances, any real doubt existed as to the purport of the charge ; nor was it that, in the guilt of defrauding two persons with names so different as *M'Cann* and *M'Carn* are, there was deemed to be any such difference in point of enormity as could justify so great a diversity of treatment : it was, that the unbending spirit of technical rules requires that you should prove, *verbatim et literatim*, the very thing which you have asserted, and, whatever may be the real issue, ties you down to the nominal one. That the substitution of an *r* for an *n* could in any other way be effected than by dropping the proceeding and beginning *de novo*, is what you will never get any Common Lawyer to understand.

It is the same when any other circumstance, legally material, is misdescribed in the pleadings ; as when the declaration stated an absolute promise, and a conditional one was proved ; and when a declaration for assaulting a constable in the execution of his office, alleged that he was constable of a particular parish, and the proof was that he was sworn in for a liberty, of which the parish was part : a notable reason for depriving the plaintiff of justice, or putting him to the expense of another suit to obtain it !\*

\* See the title *Variance*, in Starkie's Law of Evidence.

The root of the evil here lies in the system of pleading. To eradicate it entirely, that whole system must be abolished: the mode in which what is called pleading is now conducted, namely, by a sort of written correspondence between two attorneys, must give place to oral pleading, by the parties themselves, in the presence of the judge; when either no such mistakes as the above would be made, or, if made, they would be instantly rectified. Even under the present vicious system, however, the quashing of the suit might be avoided much oftener than it is. There are mistakes that are of consequence, there are others which are of none: there are mistakes by which the opposite party may have been misled, there are others by which he cannot. It is just, certainly, that after a party has intimated to his adversary his intention of proving a certain case, he should be allowed to prove that case, and no other: since, if there were no such rule, the other party might be taken by surprise: he might come prepared with evidence to rebut what he imagined was the claim against him, and might find, on going to trial, that the one really brought was quite different. This being the reason, what then is the practical rule? Let the remedy be confined to the single case, in which alone there is any evil to be remedied. If the opposite party has really been misled, or put to any inconvenience by the error, he cannot, one would think, have any reasonable objection to saying so: nor to delivering the assertion under all those securities which are taken for the truth of testimony in any other

case. Unless, therefore, he is willing, under these securities, to declare that, in consequence of the error, he has been either prevented from bringing the necessary evidence, or induced to bring evidence which was not necessary, let the error be rectified, and the cause go on as it would have done if there had been no error. If he *be* willing to make such a declaration, and if his adversary admit, or fail to disprove its truth, let the necessary delay (when any delay is necessary) be granted: and let the party by whose fault the error was occasioned, be subjected to the obligation of indemnifying the other for all *bonâ fide* expenses which he can prove to have been occasioned him by it.

If the rule, in the cases above examined, is attended with bad effects, it is not that it is a bad rule, but (as has been already intimated) that it is accompanied by a bad system of pleading. There is, however, another set of cases, in which the rule is applied in a sense in which it is altogether absurd: facts being shut out, under pretence of their not being the facts at issue, which, though unquestionably not the facts at issue, are of the highest importance as evidentiary of those which are.

Thus, the custom of one manor is not to be given in evidence to explain the custom of another manor; unless it be first proved, that both manors were formerly one, or were held under one lord; or unless the custom is laid as a general custom of the country, or of that particular district. Why? Because customs are "different in, different manors, and in their nature distinct." But although the customs

of different manors are *different*, they may nevertheless be *analogous*; and though the custom of one manor cannot of itself *prove* that of another, it may assist in clearing up apparent inconsistencies in it, or in obviating an argument grounded on its supposed improbability. There is also another reason, of still greater weight, which we owe to the ingenuity of Lord Chief Justice Raymond: "for," says he, "if this kind of evidence were to be allowed, the consequence seems to be, that it would let in the custom of one manor into another, and in time bring the customs of all manors to be the same."<sup>\*</sup> In the contemplation of so overwhelming a calamity, it is no wonder that Lord Raymond should have lost sight of whatever inconvenience might happen to be sustained by the party in the right, from losing his cause for want of such explanations as a reference to the custom of a neighbouring manor might have afforded; especially if advertence be had to the appalling fact, that the customs of all manors would come to be the same, if suffered to be shewn for what they are. The reader will not, of course, indulge in any such vain fancy, as that the custom which is good for one manor, can be good, or even endurable, for the manor adjoining; or that the inhabitants of one village could even exist, under rules and regulations which bind the inhabitants of another village as well as themselves.

Again: "in a question between landlord and tenant, whether rent was payable quarterly or

<sup>\*</sup> Phillips, i. 162.

half-yearly, evidence of the mode in which other tenants of the same landlord paid their rent, is not admissible."\* Yet what can be more strictly relevant? the determining motive in such cases usually being the landlord's convenience, which may reasonably be presumed to be the same in the case of one farmer as of another.

Mr. Harrison gives an abstract of eight cases decided under the rule that evidence is to be confined to the points in issue; seven of which include this same sort of absurdity.

It cannot be pretended, that the evidence thus shut out is irrelevant: and to maintain, as a general maxim, that evidence of relevant facts is to be excluded, because those facts are not expressly averred in the pleadings, would be too great a stretch of technicality, even for a lawyer. For the above decisions, however, no better reason can be given; unless that of Lord Chief Justice Raymond, which Mr. Phillips styles an "argument of inconvenience," be so considered.

With as good reason might any other article of circumstantial evidence be excluded. A murder, suppose, has been committed: the prisoner was near the spot; he was known to be a personal enemy of the deceased, and at a former interview he had threatened to kill him: stains of blood were found upon his linen when he was apprehended, and he had a bloody knife in his pocket. What then? None of these facts are in issue: it is not said in the

\* Harrison, *ut supra*, p. 132.

indictment, that he was an enemy of the deceased, nor yet that he had used threatening language towards him; he is not charged with soiling his linen; and though, indeed, it is alleged in the indictment, that he killed and slew the deceased with a knife, value sixpence, it is nowhere imputed to him that he stained the knife. At this rate, the plaintiff would need to include in the declaration every fact which, in the character of an evidentiary fact, he might have occasion to bring to the notice of the judge.

We have now considered the rule in both its applications: its abusive application, which can never be other than mischievous; and its legitimate application, which, to be purely beneficial, wants only to be combined with a rational mode of pleading. Suppose the system of pleading reformed; this rule, to be a good one, would only need to be always employed in its legitimate, and never in its abusive, sense. When thus restricted, however, what does it really mean? Only, that evidence is not to be admitted of any facts, except either those on which the decision immediately turns, or other facts which are evidentiary of them.

General as this rule is, greater particularity will not, in this instance, be found to be attainable; since the question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law: it respects the *probandum*, not the *probans*: it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved;

it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim.

This circumstance, obvious as it is, might easily be overlooked by one who had studied the subject only in the compilations of the English institutional writers; who, not content with directing that the evidence be confined to the points in issue, have farther proceeded, under the guise of laying down rules of evidence, to declare, on each occasion, what the points in issue are.

One whole volume out of two which compose Mr. Phillipps's treatise on the Law of Evidence,—with a corresponding portion of the other treatises extant concerning that branch of the law,—is occupied in laying down rules concerning the *sort of evidence* which should be required in different sorts of actions or suits at law. But why should different forms of action require different sorts of evidence? The *securities* by which the trustworthiness of evidence is provided for, and the *rules* by which its probative force is estimated, if for every sort of cause they are what they ought to be, must be the same for one sort of cause as for another. The difference is not in the nature of the proof; it is in the nature of the facts required to be proved. There is no difference as between different forms of action, in reason, or even in English law, in respect of the rules relating to the competency of witnesses; nor, in general, to the admissibility or the proof of written documents; nor in respect of any other of the

general rules of evidence. What Mr. Phillipps (I mention him only as a representative of the rest) professes, under each of the different forms of action, to tell you, is, what facts, in order to support an action in that form, it is necessary that you should prove.

Now what are these facts? In every cause, either some *right* is claimed, or redress demanded for some *wrong*. By a wrong, is of course meant a violation of a right. Some one or more of those facts, therefore, by which rights are conferred, or taken away, or violated, must at any rate be proved: and if proof of any other fact be necessary, it can only be as evidentiary of these. If, therefore, a man professes to tell you all the facts, some one or more or all of which you must prove, in order to get a decision in your favour; he must furnish you, among other things, with a complete list of all the facts which confer or take away, and all the acts which violate, all the rights, which have been constituted and sanctioned by law. This, accordingly, is what Mr. Phillipps and others of his brethren attempt to do. But, to enumerate the facts which confer or take away rights, is the main business of what is called the civil branch of the law: to enumerate the acts by which rights are violated, in other words to define *offences*, is the main business of the penal branch. What, therefore, the lawyers give us, under the appellation *law of evidence*, is really, in a great part of it, civil and penal law.

Another part of it consists of rules, which are

called rules of evidence, but which are really rules of pleading. These are laid down under the guise of instructions for adapting the evidence to the pleadings. It is not often, however, that a man has it in his power to mould the evidence as he pleases: but he always has the power,—that is to say, his lawyers have it for him,—of moulding the pleadings (those on his own side at least) as he pleases. These rules, therefore, for adapting the evidence to the pleadings, are, in fact, rules for adapting the pleadings to the evidence.

Two examples will illustrate the intermixture of the substantive law with the law of evidence; and one of them will also afford a specimen of the intermixture of rules of evidence with rules of pleading.

Under the title Burglary, Mr. Starkie begins by saying, that on an indictment for burglary, it is essential to prove, 1st, a felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night-time; 4thly, with intent to commit a felony. He then proceeds to inform us, that there must be evidence of an actual or constructive breaking: for if the entry was obtained through an open door or window, it is no burglary. That the lifting up a latch, taking out a pane of glass, lifting up folding-doors, breaking a wall or gates which protect the house, the descent down a chimney, the turning a key where the door is locked on the inside,—constitute a sufficient breaking. That where the glass of the window was broken, but the shutter within was not broken, it was doubted whether the breaking was suf-

ficient, and no judgment was given; and so on in the same strain. Who does not see that all this is an attempt,—a lame one, it must be confessed, (which is not the fault of the compiler), but still an attempt,—to supply that *definition* of the offence of burglary, which the substantive law has failed to afford?

The title “burglary” consists of twelve octavo pages, not one line of which is law of evidence. It is all, like the part above extracted, penal law; except three pages, which are occupied in stating how the ownership of the dwelling-house, in which the offence was committed, must be laid in the indictment; and which therefore belong to pleading.

To take our next example from the non-penal branch of the law: when Mr. Phillipps, in treating of the sort of evidence required to support an action of *trover*, informs us, that the plaintiff in this action must prove that he had either the absolute property in the goods, or at least a special property, such as a carrier has, or a consignee or factor, who are responsible over to their principal; and further, that he must shew either his actual possession of the goods, or his right to immediate possession; and that he must prove a wrongful conversion of the goods by the defendant, and that the denial of goods to him who has a right to demand them, is a wrongful conversion; and that the defendant may shew that the property belonged to him, or to another person under whom he claims, or that the plaintiff had before recovered damages against a third person for a conversion of the same goods, or that

he was joint tenant of the property with the plaintiff, or tenant in common, or parcener, or had a *lien* on the goods, or a hundred other things which it would be of no use to enumerate; what can be more plain, than that he is here telling us, not by what evidence an action of trover is to be sustained, but in what cases such an action will lie: that he is telling us, in fact, what we are to prove, not by what evidence we are to prove it; that he is enumerating the *investitive* facts, which will give to the plaintiff a right to the service which he claims to be rendered to him at the charge of the defendant; and the *divestitive* facts, by which that right will be taken away from him.

Yet, of this sort of matter the whole of the chapter, a few sentences excepted, is composed; and this it is that composes the greatest part of almost all the other chapters in the volume; which yet does not include any sorts of causes except those which, in form at least, are non-penal.

I do not mention this as matter of blame to the institutional writers from whose compilations the above examples are drawn. There are some things really belonging to the subject of evidence, which it is necessary to state in treating separately of each particular kind of action; viz. the nature of the corresponding *pre-appointed* evidence, (if the law has rendered any such evidence necessary to support the claim that is the subject of the action); and also the nature and amount of the evidence which the law renders sufficient to establish a *prima facie* case, and throw the *onus probandi* upon

the other side. With this matter really belonging to Evidence, it may be convenient to mix up such matters belonging to civil and penal law, as ought to be adverted to by the professional agent of the party who brings the action. The arrangement which is best for the practitioner, or the student of the law, differs as much from that which is best for the philosopher, as the alphabetical arrangement of words in a dictionary differs from the methodical classification of them in a philosophical grammar.

## CHAPTER VI.

## OF NEGATIVE EXCLUSIONS.

WHATEVER be the matter of fact in dispute, or (considering rights and obligations antecedently to all dispute) whatever be the matter of fact on which the existence of the right or obligation in question depends; taking things as they exist at any given point of time, let us conceive, as existing at that point of time, a certain quantity of evidence, operating in affirmance or disaffirmance, or part in affirmance, part in disaffirmance, of such right or obligation.

Setting aside the case of preponderant inconvenience in the shape of vexation, expense, and delay; the established system of procedure, if perfect in this respect, but no more perfect than it might be and ought to be, must have secured the existence of two results: 1. that the whole stock of evidence so existing, shall, in case of the existence of a demand for it for a judicial purpose, be actually presented to the cognizance of the judge: 2. that the evidence so presented, be presented in the most trustworthy shape of which (regard being had to the particular nature of it, whether testimonial, real, or written) it is susceptible.

Arrangements directed to the former of these ends have for their object the *forthcomingness*,—

those directed to the latter end, the *trustworthiness*,—of the stock of evidence.

Regard being had to collateral inconvenience, as above mentioned; to make the most effectual provision which the nature of things admits of, for securing the forthcomingness of the existing stock of evidence as above described, is among the incontestable duties of the legislator. This being admitted; if, in this or that particular, a provision directed to that object has altogether been omitted to be made,—or, having been made, has failed of being effectual in the degree in which it might and ought to be effectual; the consequence is, that, to the extent of such deficiency, an exclusion may be said to have been put in a sort of negative way, a negative sort of exclusion may be said to have been put, upon the correspondent lot or article of evidence.

If, in any instance, in consequence of any such exclusion, a particle of any such obtainable evidence fail of being presented to the cognizance of the judge; and the consequence of such failure be misdecision or failure of justice, whereby the benefit of the right in question is lost; injustice, proportioned to the value of such benefit, is the result.

Non-compulsion is negative exclusion. To refuse to take, at the instance of the party having need of the evidence, the steps necessary to cause its being forthcoming, is to exclude it. Various are the shapes in which denial of justice manifests itself: various are the shapes; and this is one of them.

If, in this point of view, we cast an eye over the collection of established systems, we shall

find the deficiencies under this head deplorably abundant, the mass of these exclusions and these injustices proportionably ample.

It is only however *pro memoria*, that the subject is in this place brought to view. To give a view of the system of arrangements by which, on the head of forthcomingness, the demands of justice promise to be satisfied, and the existing deficiencies (as above) supplied, belongs to the subject of *procedure* at large.

To the head of negative exclusion belongs (as we have seen) a large division of the cases of direct exclusion which have formed the subject matter of this Book. But in those cases the exclusion was in every instance the result of express determination, called forth by actual views of the subject by the ruling powers: in the present case, it may, in many instances, have been the result of mere oversight, and want of reflection; and in every instance, this purely negative cause would have been adequate to the production of it.

## EVIDENCE.

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### BOOK X.

INSTRUCTIONS TO BE DELIVERED FROM THE LEGISLATOR TO THE JUDGE, FOR THE ESTIMATION OF THE PROBATIVE FORCE OF EVIDENCE.

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#### CHAPTER I.

##### PRELIMINARY OBSERVATIONS.

SECT. I.—*Use of instructions from the legislator to the judge, relative to the probative force of evidence.*

WE have seen the causes, the psychological causes, by the operation of which, on the mind of the witness, deception is liable to be produced in the mind of the judge: sinister interest, improbity, and imbecility; to one or other of these we have seen all those causes to be referable. Had the *immediate* causes alone been to be taken into the account, the catalogue might have been still shorter: *improbity* might have been omitted; since it is only in as far as it is coupled with sinister interest, it is only through the intervention of sinister interest,

that, to this purpose or any other, improbity is capable of operating in the character of an active principle.

We have seen that in no instance can any one of these circumstances be employed with propriety as a ground for the *exclusion* of any article of evidence. But what we have also seen, is, that there is not one of them by which a just cause is not presented for regarding the evidence with a *suspicious* eye; for regarding the *trustworthiness* of it as diminished by the influence of the circumstance. Hence the propriety of delivering a set of instructions to the judge, pointing out to his observation the source and degree of its inferiority in point of trustworthiness; of its tendency to produce deception; and thus putting him upon his guard.

For exclusion, substitute the rival remedy, instruction; nothing, it will be seen, can be more innocent; nothing, in every point of view, more unexceptionable.

In so far as the instruction is *operative*, all the good that could have been done by the rough remedy of exclusion, is done by this gentle and rational substitute.

If *inoperative*, inasmuch as the same line of conduct as that which is indicated and recommended by the instruction, would have been practised without it;—even then, and at any rate, it does no harm.

But, under the system of instruction, and in spite of the instruction—in this and that instance (it may be said) it may happen to the judge to give credence, or appear to give credence, to this inferior evidence; and thus being, in reality, or perhaps in appearance only, de-

ceived and misguided by it, misdecide in consequence: an injustice which, if the deceptitious article of evidence had, by an obligatory rule of law, stood excluded, would not have taken place.

True: after hearing, under the system of instruction, an article of evidence that under the exclusionary system would have stood excluded, it may happen to the judge to misdecide. But so it may, and ever and anon does, happen to the judge to misdecide, after hearing evidence of a sort to which no exclusion has, under any system, been applied. Under the system of instruction, the judge has before him the instruction, which, in its nature, cannot be so much as intended to serve as a guide to the *understanding* of a judge, without also serving as a check upon his *will*: serving on each occasion to point the attention of the public to the course taken on that occasion by the judge.

Of the exclusionary system, in so far as it extends, the effect is to tie up the hands of the judge. It is the application of will to will: of arrogance to subjection: of a man without understanding, to another labouring (as he presumes) under the like misfortune. It is the policy of one to whose perverted optics all men are liars, and all judges fools. So many exclusionary rules, so many insults offered by the author of each rule to the understanding of those whose hands are expected to be tied by it. Coming from the legitimate legislator, addressed by him to his subordinate, the judge,—whatsoever self-conceit and rash presumption there might be in it, there would be, at least,

no usurpation, no pretergression of the bounds of official authority: the hands he ties up are the hands of his constitutional subordinate, hands to which, be the occasion what it may, in some way or other he applies additional bands by every word he utters. But, in fact, so it is that (in England at least) the exclusionary rules have not, in any instance, had the will of the legitimate legislator for their source: in every instance they have had for their author some lawyer, in the character of a judge, who, tying or pretending to tie his own hands, has provided a set of manacles, ready made manacles, into which his successors, to save the trouble of thinking, have spontaneously introduced their hands.

But though, in this, or in any other system of incongruous arrangements, the influence of folly ought never to be left out of the account; there seems reason enough to suspect, on the grounds so often already referred to, that, in the composition of this system, improbity, lawyer-craft, acting under the spur and the direction of sinister interest, had an important share.

Hitherto, whether in the character of legislator or pseudo-legislator, man has manifested (and certainly not altogether without reason) less confidence in the ascendancy of his understanding than in the efficiency of his will: had it been otherwise, laws would have been somewhat less numerous; instructions (I mean from the legislator to the judge) would not have been, as they are to this day, almost without example.

One consolation is, that, in the way of instruction, it is not altogether out of the sphere

of industry and intelligence, though unclothed with power, to be of use. When the individual is out of the way, jealousy dies with him; and then comes the time for his words to pass for whatever may be their value. Among the living, wisdom is no where to be found, but in the seat of power: she lodges under the privileged robes, and is passed from hand to hand, in company with seals and purses.

In the ensuing pages, a sample may be seen of the instructions, which, on the subject of evidence, it might be of use for the legislator to furnish, to serve as a light to guide the footsteps of the judge.

The more plainly true it may happen to them to be, the less extraordinary they will appear, and the less free from all pretension to be taken for any thing beyond the obvious dictates of simple common sense.

In the case of a body of instructions,—supposing a code of that description to be inserted in the aggregate body of the laws,—one comfortable reflection presents itself, viz. that by this part no addition need, nor therefore ought, to be made, to that part which, in the shape of an inevitable load, is imposed upon the memory of individuals. The subject, the private citizen, as such, has no need to load himself with it; it belongs not either to the catalogue of his duties, or to the catalogue of his rights. The person whose judgment it is calculated to assist, is the judge, and no one but the judge: the person for whose assistance, in the way of instruction, it is designed, is the judge. To the individual it is of no use, but in the event of his having the misfortune to become a suitor:

nor then, but in the event of his observing, on the other side, some witness or witnesses whose testimony he observes or suspects to be exposed to the action of some interest, some sinister interest, against the seductive influence of which it concerns him that the judge should be sufficiently upon his guard.

SECT. II. — *Instructions to the judge not given under existing systems, and why.*

UNDER existing systems, when a lot of testimony, exposed on any particular score to suspicion, is brought forward, the grand, or rather only, object of consideration is, whether or no it shall be admitted. If admitted,—what degree of credit shall be attached to it, (*i. e.* what circumstances there are in the situation of the witness, by which the degree of confidence that might otherwise be reposed in his testimony may be diminished), is a topic scarce ever so much as glanced at. It is, accordingly, only for the purpose of serving as a ground of exclusion, that any circumstance, in the character of a cause of comparative untrustworthiness, is ever brought to view. If, in the character of a legal ground for exclusion, the circumstance is sustained, it is then pronounced an objection, a good objection, to the *competency* of the testifier: if in that character it be repelled, it is then said to be not good as an objection to the competency of the witness, but as an objection that goes to his *credit*; and in that character, if it be a jury-cause, to be considered by the jury.

Here then, and without any sort of instruc-

tion or assistance from the official judge,—the jury, by the light of common sense, are supposed to be natural, competent, and perfect judges of the degree of credence proper to attach to any the most suspicious evidence, against which the door of the witness-box is not peremptorily shut:—while, as to the question whether it shall be heard or no, it is at the same time taken for granted that they are radically incapable of forming any tolerable judgment, even with the help of all that official wisdom to which, where the question is concerning the interpretation to be put upon an article of law (whether jurisprudential, that is imaginary, or statutory, that is real, law), they are expected to pay the most implicit deference.

The question thus referred to the jury, one might here suppose, might be an occasion for the advocates on both sides to display their eloquence: on one side in exaggerating, on the other in depreciating, the force of the mendacity-promoting interest, or other supposed cause of untrustworthiness, whatever it may be.

In fact, an allusion of this sort cannot but now and then be made; but as for any argument at large, any regular debate, it may be questioned whether one instance of any such argument be to be met with any where.

The reason (one reason at least) seems not difficult to divine. Besides the universal absurdity, so inconsistent are the exclusionary rules, that, while interests purely nominal, plainly incapable of exciting in the breast of any human being any the smallest particle of interest, of exercising in it any the smallest particle of

influence, are received as grounds for absolute exclusion,—a dose of interest, compounded of the strongest ingredients that human nature furnishes, is not received in that character. The consequence is, that against calculation, comparison, ratiocination, the door is shut by a kind of instinct. Ground thus laid out is as unfit a field for rational argument, as a crowded china or glass shop would be for a fencing or a boxing match.

By the same considerations it is rendered pretty obvious, how it has happened, that, for the guidance of the jury, little or nothing in the way of instruction can rationally be expected from a judge. Instruction to a jury from an English judge? Not a proposition, no not a syllable, could he utter, on any part of the whole subject, without running full butt against some one or other of his rules: without proclaiming the absurdity and mischievousness either of some exclusionary rule, or of some exception taken out of it.

Well, therefore, may he leave this exercise of the judicial faculty to the jury,—to any body who will exercise it, or profess to exercise it: feeling, as he cannot but feel, his utter inability to afford to them any the smallest assistance, without exposing to merited contempt the system of doctrine to which he is tied down: doctrines for which neither defence nor apology can be found by any human being, and of which, in his situation, it would not be decorous to speak the truth.

On the score of interest, (for example), to what use could it be for a judge to set about weighing grounds of objection, when in so

what sort of person then shall it come? From the attorney,—who, being paid at so much a sheet, exhausts his powers in the efforts made to find surplusage, screwing up to its maximum the multitude of the sheets? Or from the scantily pensioned draughtsman, whose occupation it is, while an exhausted treasury is gaping for sustenance, to draw tax bills against time; and who, never having opened his eyes to any thing better, looks up to surplusage, to the works of the attorney, as the only models for his works?

From whom can any such information be looked for, but from one by whom the field has been surveyed, and surveyed in all its bearings, with views directed to the ends of justice? But, under the fee-gathering system, in what corner of any inn of court or chancery can any such person be looked for, with any expectation of finding him? To what ends, in any of those receptacles of sham learning, can men's views have ever been directed, but to the ends of existing judicature, the very opposites of the ends of justice?

SECT. III.—*Object and character of the following instructions.*

OF the ensuing body of instructions, the object will be, to point out to the notice of the judge the several circumstances, which, by the influence they exert on the will of the witness, or the indications they afford of his disposition and character, moral and intellectual, present themselves as having the effect of demonstrating the trustworthiness of his evi-

dence,—the probability of its being at once correct and complete,—of its conforming itself throughout the whole course of it to the line of truth:—or else diminishing this probability on the part of the testimony, and thence diminishing the degree of the probative or persuasive force with which it is fit that it should act on the mind of the judge.

Antecedently to the present stage of the work, this topic never presented itself for consideration. Why? Because, from the first to the last, the proposition maintained has been, that, be the degree of trustworthiness ever so small, ever so low, it can in no case form a rational ground for the exclusion of the evidence. But supposing this granted, then and not till then comes the question, what degree of persuasive force to attribute to it.

As to a great part, (perhaps by much the greatest), they will be found so obvious to the most uninformed mind, that, in the character of *information*, nothing could be more superfluous, and even impertinent; but in the way of *memento*, the faculty of recurring to them may not be the less useful and commodious. Of a dozen considerations, immediately following one another, it may happen that there is not a single one that would not to the most uncultivated understanding be an obvious one. But it may happen, that, for want of a simultaneous view, some one of them may be out of mind: and for want of that one, the decision, the judicial operation, may fail of being so correct as it might and ought to have been.

If, in the instance of the merely curious reader, there be any thing in them capable

of affording to his understanding the slightest degree of instruction, or exciting in his mind the smallest spark of interest; it must be the continually repeated contradiction and disproof they give to the rules which govern the existing practice.

For in this quarter of the field of law, (not to speak of so many others), the art of the English lawyer (not to speak of other lawyers) has two branches: the art of knowing that, which has no existence, and the art of not knowing what is known to every body else.

Throughout the whole course of these instructions, the English reader, and more particularly the English lawyer, would be apt to expect, and thence to be more or less disappointed at not meeting with, a number of technical terms, which, in the part here in question of the field of law, are in present use. Had they been found capable of answering the purpose of correct information, there is not one of them that would not have all along been employed. But, in this, as in other branches of science, it is not in the nature of terms of extensive import, of generic terms, where the result of erroneous views of the subject, to be capable of serving for the enunciation of truth.

Of the classes among which transgressions productive of real mischief have been distributed in another work,\* ten or a dozen characteristic properties have been enumerated, as respectively belonging in common to the offences aggregated to each respective class:—

\* Introduction to Morals and Legislation. Dument, *Traité de Législation*.

such and such properties to all offences against other individuals; such and such to offences, or supposed offences, against a man's self; such and such to offences striking not against any assignable individuals, but undistinguishably against all the individuals of which the public is composed.

But, of the classes of offences, and other acts and objects, as made up by the technical denominations employed by the technical system, it is a property, (and the only property they have in common), to have no natural property in common: to have nothing in common but the artificial arrangements made under that system in relation to those objects. Take, for example, the words crime, misdemeanour, felony, præmunire, tort, larceny, arson, &c. &c.

The omission was indispensable. Throughout the whole course of the work, the purpose of it being to deliver useful truth, and nothing else; terms which could not be employed without disseminating error, pernicious error, were incapable of being rendered subservient to the purpose: just as a mixture composed of arsenic and sugar, would be incapable of being made into syrup, as a vehicle for any useful medicine.

But, from this omission, no sort of privation or inconvenience in any shape will accrue to any body; at any rate to the non-lawyer. The words which, in the room of these technical ones, are employed,—these natural expressions, though they belong not to the language coined by lawyers, belong not the less in fact, and by rather a better title, to the English language. The words thus carefully, because necessarily,

excluded, belong all of them to a sort of cant or slang, the opprobrium of the body of the language: a sort of slang never used but to a bad purpose, incapable of being ever applied to any good one. By the omission of this lawyers' jargon, the reader (the non-lawyer at least) is no more left at a loss, than he is by the omission of that other sort of flash language called the thieves' cant or slang, the language in use among unlicensed depredators.

The judge for whose use these instructions are designed, is a judge whose views (the source of corruption being supposed to have been previously dried up) are directed, not to the established ends of judicature, but to their opposites, the ends of justice: and to such new views the common language of Englishmen will be found as congenial, as the established lawyers' slang will be found inapplicable.

## CHAPTER II.

OF INTEREST IN GENERAL, CONSIDERED AS  
A GROUND OF UNTRUSTWORTHINESS IN  
TESTIMONY.

WHATSOEVER be the general disposition and character of the proposed witness, the trustworthiness of his testimony is liable to be affected by the interests of all kinds, to the action of which, at the time of delivering such his testimony, he happens to stand exposed.

Between the ideas respectively denoted by the words *interest*, motive, hope, fear, good, evil, pleasure, and pain, the connexion is inseparable.

Without motive there is no interest; without hope or fear there is no motive; without good\* or evil, there is no hope or fear;† without pleasure or pain there is no good or evil.

\* The word *good*, in as far as any precise signification is annexed to it, denotes indifferently either pleasure, or the negation of pain, (present or future), or whatever is regarded as a cause more or less probable of pleasure, or of the negation of pain, *i. e.* as a security against pain. Take away the ideas of pleasure and pain, you have the word good without a meaning: your good, if so you persist in calling it, your *good*, if such it be, is of no value. By a few obvious changes, this same account will serve as well for *evil* as for *good*.

† Expectation of an event, is the persuasion, more or less

To the several sorts of interest, therefore, correspond so many sorts or modifications of motives, hopes and fears, good and evil, pleasure and pain.

The interests, the influence of which is strongest, and most likely to be exerted upon testimony, are those which arise out of the following classes of pains and pleasures.

#### PLEASURES.

1. The pleasures of taste.
2. The pleasures of the sexual appetite.
3. The pleasures of wealth.
4. The pleasures of power.
5. The pleasures of reputation.
6. The pleasures of ease.
7. The pleasures of novelty (or gratified curiosity).
8. The pleasures of the religious sanction.
9. The pleasures of sympathy.
10. The pleasures of antipathy.

#### PAINS.

1. The pains of death.
2. Severe bodily torments.
3. The pains of poverty.
4. The pains of disgrace.
5. The pains of labour.
6. The pains of the religious sanction.
7. The pains of sympathy.
8. The pains of antipathy.

strong, of its probability. Hope is expectation of good; fear, expectation of evil: in the import of each of these words, therefore, two distinct ideas, one of the persuasion, the internal judgment or sentiment, the other of the event, the exterior subject or object of the judgment, is included.

In regard to pleasures and pains, besides those which are to be found in the above list, a variety of others are exemplified in experience. But, in whatsoever number and variety those which are not inserted in it may be to be found, they will (it is supposed) be found to come, all of them, under this description, viz. that the pleasures are such as to be at the command of whosoever possesses the taste or relish on which their existence depends, and by that means are incapable of exerting an influence on testimony; the pains such, that the avoidance of them depends not upon testimony.

If, in the case of a pleasure, it be of such a nature as to be on some occasions at a man's command, on other occasions not at a man's command without his being in possession of some object serving as the instrument of that pleasure, and the possession of such instrument is not to be obtained without money, but is to be obtained by money; the pleasure, in this latter case, comes under the head of the pleasure of *possession*, with relation to the matter of wealth,—and becomes pregnant with one of the interests capable of acting upon testimony, viz. pecuniary interest.

Thus, (as was the case with the earliest astronomers), if a man, having a taste for astronomy, can content himself with the pleasure of contemplating the celestial objects on a clear night, so far the pleasure he enjoys belongs to the class of those which are not pregnant with an interest capable of operating upon testimony. But if, to enable him to reap this pleasure, he requires an instrument, such

as a telescope, the property or use of which is not to be obtained by him but for money, in that case his pleasure is pregnant with a sort of interest which is either the same with pecuniary interest, or equally capable of exerting an influence on his testimony.

So, again, if it requires him, as the study of astronomy by a clear night without an instrument would do, to be at liberty; and for want of money to purchase his liberty, he is confined to a chamber lighted only from within. So, again, if, having a relish for the pleasures derived from the ideas of the sublime and beautiful, as presented by natural objects, such as the sun, the moon, mountains and valleys, seas and rivers, the objects themselves are not sufficient for him, without the assistance of Macpherson's *Ossian*, or Thomson's *Seasons*, or Burke on the *Sublime and Beautiful*; and the books are not to be had without money, nor the money without testimony.

So again, in regard to pains: for example, the pains attendant on this or that disease or indisposition. If, truly or falsely, they are understood to be out of the reach of cure, they too, like the pleasures, are incapable of giving birth to any of those interests by which an influence is occasionally exerted on testimony. But if, being understood to be within the reach of cure, the administration of the cure is (as in general it will be) necessarily attended with expense, then they come within the description of those pains which, by the interest with which they are pregnant, are capable of exerting an influence upon testimony.

Without wine, for example, or without sea-bathing, relief (it is understood) is not to be had; by means of wine, or of sea-bathing, it is to be had: but the wine, or the sea-bathing, is not to be had without money, nor the money without testimony.

Thus much for illustration, and for removal of objections. But in the cases here exemplified it is sufficiently evident, that though at a first view it may appear that by the pleasure or pain in question an influence is exerted upon testimony, and that on that score they ought to have been comprehended in the list; yet, upon a closer examination, it appears that the interest by which the testimony is acted upon in those cases, is neither more nor less than pecuniary interest; and that the force of it is proportioned to the pecuniary value of the several instruments in question, the instruments by which the pleasure is expected to be procured, or the pain removed.

The degrees of which the scale of testimonial trustworthiness is susceptible, can rarely be any thing better, any thing more precise, than merely *relative*: *absolute*, the nature of the subject does not, in general, allow them to be. In some instances (as will be seen presently), and only in some instances, you can say that, whatever be the trustworthiness of the testimony in this first case, it is less in that other case, still less in that third case; but how much less, is what you cannot say in either case: language furnishes you not with the means.

It is not with trustworthiness in psychology, as with temperature in physics; in which you

can say not only it was cooler yesterday at noon than to-day at the same hour; but, by observation taken each day on the thermometer, you can express the difference, by numbering in each case the degrees.

The only state of things in which the force of an interest (whether in the character of a mendacity-promoting or in that of a mendacity-restraining interest) is susceptible of measurement, is that in which the correspondent pleasures or pains have for their efficient cause an object susceptible of mensuration.

Out of all the species of interest, it is only in two that this case is verified, viz. pecuniary interest, and the aversion to labour.

In the case of pecuniary interest, for example, every body sees, that upon a given person (proximity and probability being in both cases the same), the operative force of a sum of 20*l*. will be, practically speaking, (though not in mathematical strictness), double that of 10*l*.

So, in the case of aversion to labour, the operative force of a course of labour for two hours, will be, practically speaking, double that of a course of labour of the same sort for one hour, and, mathematically speaking, something more.

The irksomeness of labour depending so much more upon the species, than upon the quantity as measured by time; and of labour, the same in species as well as quantity, the degree of irksomeness being so widely different in different individuals, in such sort, that a quantity of labour which to one man is highly irksome, shall to another be not merely indifferent, but highly agreeable; quantity of labour

forms but an imperfect and incompetent subject of mensuration.

There remains, therefore, *money* as the only efficient cause of interest, and pecuniary interest as the only interest, the force of which, in the character of a mendacity-restraining or mendacity-promoting interest or motive, is commodiously measurable.

Yet, this measuring rule once obtained; by reference to this (by means of the principle of commercial or commutative exchange) cases will happen in which the force of any other species of interest may by accident become susceptible of mensuration.

Thus, suppose two political situations affording honour or power, (both or either), without profit:—considering each by itself, it may be difficult to form any sort of estimation of the degree of force with which, in the character of mendacity-restraining or promoting interests, they may respectively operate upon the mind of a given person. But suppose them to have been, each of them, the objects of purchase and sale, the one having been bought and sold for 2000*l.*, the other for 4000*l.*: in this case, the force of the interest constituted by them respectively, is as susceptible of mensuration as that of an interest constituted by money.

For an injury done, or supposed to be done, the party injured, prosecutes the supposed injurer. He knows beforehand, that (such is the course of practice) he will not, even in the event of his succeeding in the prosecution, receive satisfaction in any pecuniary shape: he understands, on the other hand, that the

amount of the expense on his side is not likely to be less than 50%. He prosecutes notwithstanding, and delivers his testimony. The interest by which he has been engaged to embark in this prosecution, is the interest created by that modification of the pleasure of antipathy, called the pleasure of revenge. Here, then, not indeed the exact force of that interest, but the minimum of it, is given, and expressed in money. It is certain that it acts upon him with a force at least equal to 50%, that is, to the apprehension of losing 50%; since he pays 50% for the purchase of a chance of it. With how much greater a force, does not appear: since it does not appear how much more he would have spent in prosecuting, rather than not obtain the pleasure of the revenge.

There are five species of interest, to the action of all, or most of which, a witness is generally exposed: all concurring in exercising on his testimony a tutelary, a mendacity-and-falsity-restraining influence; an influence such, that the stronger it is, the greater is his trustworthiness: acting consequently in the character of so many *sanctions*,\* contributing, all of them, to bind him to the observance of the laws of truth. They are:

1. The fear of labour, or love of ease; produced by the difficulty of composing, for the occasion, and on the spot, a statement which, being more or less false, must, to answer any purpose that can be answered by falsehood, wear the appearance of being true. Corresponding sanction, the physical sanction, viz. the self-regarding branch.

\* See the last chapter but one of Book I.

2. The fear of shame : viz. of the shame, and consequent contempt or ill-will, which mankind in general are apt to entertain towards one who, on any such important occasion, is supposed to have willingly departed from the line of truth. Corresponding sanction, the moral or popular sanction.

3. The fear of punishment, legal punishment : viz. suffering, under the name of punishment, in general expressly attached, by the power of the law, to every departure, at least when wilfully made, on any such occasion, from the line of truth. Sanction, the political sanction.

4. The fear of supernatural punishment : of the punishment to be expected in case of every such transgression, at the hands of Almighty Power. Sanction, the religious sanction.

5. Regret at the thoughts of the evil, of which, at the charge of this or that individual or assemblage of individuals (the witness himself not included), the transgression in question may be considered as more or less likely to be productive. Sanction, the sympathetic sanction ; another branch of the physical sanction, the social branch.\*

In the instance of sympathy, the direction in which it acts is far from being so uniformly and steadily on the tutelary or mendacity-restraining side, as that of any of the four preceding sanctions. In a cause of a purely criminal

\* These several species of interest are termed different species, not as corresponding to so many different species of pain or pleasure, but to pain or pleasure in general, considered as apt to flow from so many distinguishable sources.

and penal nature, presenting a defendant thereby exposed to punishment, and no individual specially injured on the other side, and the witness satisfied of his guilt; in this case, the action of this interest (supposing all the other tutelary and mendacity-restraining interests out of the question) would be solely on the mendacity-promoting side. In a suit between one individual and another, (punishment out of the question, and nothing in dispute but money or money's worth, claimed by one, and refused to be given up by the other), love of justice, as well as all partial regard, out of the question, this interest could have no place on either side. Remains, as the only case in which this interest regularly joins its force to that of the other masses of interest above mentioned as constituting the four regularly-acting mendacity-restraining sanctions, the case where, the suit being purely penal, the defendant was not guilty; *i. e.* does not present himself as being so, to the mind of the person whose testimony is considered.

Of the several sorts of interest mentioned in the table, there is not one that is not capable of acting on a man's testimony in a sinister direction, that is, in the character of a mendacity-promoting interest.

Nor is there one to which it may not by accident happen to act in the opposite direction: that is, in the character of a mendacity-restraining interest, an occasional, casual, mendacity-restraining interest, acting in conjunction with the standing tutelary or mendacity-restraining motives above mentioned.

Nor is there, consequently, a sort of witness

to whose testimony, in almost any sort of cause, it may not happen, to be exposed to the action of any number of casual interests on either side, or on both sides.

All other circumstances being the same; the greater the affliction of the party suffering by the testimony will be apt to appear in the eyes of the witness,—and thence (unless in as far as any difference can be seen to have place) the greater it is in reality, *i. e.* in the eyes of the judge,—the greater the improbability of the testimony being mendacious.

1. One reason is, that the greater the suffering of the party against whom the testimony operates, the greater is the force with which, on a person whose individual character is unknown, one of the five mendacity-restraining sanctions, *viz.* the force of sympathy, may be expected to act.

Thus, in a criminal case, the punishment being capital, or in any other way ultra-pecuniary; it is less probable, that, by a pecuniary interest of a given magnitude, or by the interest of revenge, a man should be induced to aim at producing the conviction of an innocent defendant by false testimony, than if the affliction to the defendant were confined to a mere pecuniary loss, or any other punishment not beyond pecuniary.

2. Another reason is to be found in that love of justice, which, at least in a civilized state of society, may be considered as having more or less hold on every human breast.\*

\* This love of justice, commonplace moralists, and even a certain class of philosophers, would be likely to call an

The criminal fact being by the supposition false, and, by the witness in question, known to be so; the punishment (supposing the infliction of it produced by the testimony) will, by the supposition, be unmerited, unjust.

Were it not for this love of justice,—the punishment about to be produced by the testimony, in case of its being mendacious, being the same,—the disinclination to give into the mendacity would be the same, whether in point of fact the charge were true or false, and the punishment, accordingly, merited or unmerited. But, of a disposition contrary to such indifference, the prevalence seems to be indicated by general experience.

To exert an influence on testimony, an interest, be it what it may, acting in which of the two opposite directions it may, must exist (the idea of it as existing must at any rate be present to the mind) at the time of delivering the testimony.

If, at that time, a man does not stand exposed to the action of any interest urging in a sinister

original principle of human nature. Experience proves the contrary: by any attentive observer of the progress of the human mind in early youth, the gradual growth of it may be traced.

Among the almost innumerable associations by which this love of justice is nourished and fostered, that one to which it probably owes the greatest part of its strength, arises from a conviction which cannot fail to impress itself upon the mind of every human being possessed of an ordinary share of intellect,—the conviction, that if other persons in general were habitually and universally to disregard the rules of justice in their conduct towards him, his destruction would be the speedy consequence; and that by every single instance of disregard to those rules on the part of any one, (himself included), the probability of future violations of the same nature is more or less increased.—*Editor.*

direction, it matters not to what interest acting in that direction he may have stood exposed at any former period. His testimony will not be a less correct or complete expression of the recollections presented by his memory at that time.

But, should that have happened which is very apt to happen, and which in almost all instances will have happened, viz. that, antecedently to the judicial statement which a man makes on the judicial occasion under the authority of the judge, he has held discourse relative to the fact in question (whether in writing or *viva voce*) in the presence of any other person or persons; in this case he has an interest in not delivering, on any judicial occasion, any such testimony as shall be irreconcilable with the antecedent discourse. This interest is, at any rate, the interest of his reputation: the motive for perseverance, the fear of shame: and to this must be added, in many cases, the fear of punishment; viz. of punishment which the falsehood may be a means of drawing down upon him, in case of a prosecution as for perjury, supported by the testimony of the persons in whose presence it happened to him to deliver, on that former extra-judicial occasion, a statement with which his present judicial testimony is irreconcilable.\*

\* Of the influence above spoken of in the text, the case of Elizabeth Canning, anno 1754, reported in the State Trials, affords a memorable example. Out of the knowledge of her friends, she had been absent from home for about a month, upon some love errand. On her return, being pressed by interrogations, she fabricated a story of her having been car-

To the action of this interest a man stands exposed, whether the antecedent extra-judicial statement was true or false. If false, here then are two of the standing tutelary and mendacity-restraining interests, fear of shame and fear of punishment, acting by accident (one or both of them) in the direction and character of mendacity-promoting motives.

Not that in this case they act in general, either of them, with their whole force on the sinister side. For here, the testimony dictated by the fear of shame, with or without the fear of punishment, is, by the supposition, false and mendacious: it being false, the discovery of its falsity will, in a greater or less degree, be probable: and should such discovery event-

ried off for the purpose of violation to a house of ill-fame, a few miles from her abode in London; from whence, after being kept without food for weeks, in a manner almost miraculous, she at length made her escape unviolated. The story exciting public attention, two women were apprehended, and tried for their lives, as for having robbed her in that house, and one of them convicted. The story being a compound of improbabilities, the convict was respited; and in the interval, counter-evidence of the *alibi* kind presenting itself in abundance, she was prosecuted for perjury; and, after a trial of the unexampled duration of fourteen days, convicted: on evidence which, though at that time it divided the bench at the Old Bailey (composed chiefly of aldermen) into two nearly equal parts,—leaves, at this time of day, not the smallest doubt. She was in consequence transported to America for seven years.

In this instance, by the force of one of the tutelary interests, fear of shame, the wretched woman was driven (we see) into an enterprize of murder against the lives of two innocent persons: as, by the same impulse, so many unhappy women are every day drawn into a transgression, which, by a blind abuse of power, is devoted to the same murderous punishment, because, by an abuse of language, called by the same name.

ually take place, then comes the shame and the punishment on that side.

Though it is only where present at the time, that an interest of any kind, acting in a sinister, mendacity-promoting direction, can exercise any influence, produce any falsity, in the testimony; yet neither should the influence of any interest by which it may have happened to the testimony to have been acted upon at any antecedent period, be in every case disregarded. Supposing the witness not tied down by any antecedent extra-judicial statement as above, there is no interest prompting him to represent the matter in any other light than that in which it presents itself to his recollection at the time. But the influence of interest is not confined to the operation of delivering the testimony, nor to the point of time at which that operation is performed. At the time when the fact in question took place, it may have influenced, perverted, and partialized, the perceptions presented by it, the sort of cognizance taken of it: at any succeeding point of time, it may have influenced in like manner the recollection of it, the picture retained of it in the mind. For the will is on all occasions liable to be influenced by interest. Attention is in great measure at the command of the will: and by a partial direction given to the faculty of attention, conception and recollection are both capable of being rendered imperfect, and partial to one side.

On looking over the list of interests and motives, this or that one will be apt to present itself as being likely, upon an average, to act

with greater force than this or that other. But there is no species of interest, the action of which has not, by the testimony of experience, been proved to be occasionally susceptible of every, or almost every, degree of force, from the lowest to the highest. In particular, there is none the action of which is not susceptible of a degree of force equal at least to that of pecuniary interest created by the greatest sum of money that has ever been depending upon a man's evidence.

A consequence is, that from the mere observation of the *species* of the interest to which the action of a man's testimony is exposed, no just inference can be formed respecting the degree.

Another consequence is, that neither on the *number* of interests and motives acting on the same side, can any such inference be grounded. For suppose half a dozen motives acting on one side, and on the other no more than one: in the instance of each of the half dozen interests, the degree of force may be so low, and at the same time that of the single interest so high, that the single one may preponderate.

This state of things is actually exemplified in the case of perjury for lucre. In the character of a seducing, a mendacity-promoting motive, the force of pecuniary interest preponderates over that of all the standing tutelary and mendacity-restraining motives, love of ease, fear of shame, fear of punishment, fear of God, sympathy for the injured: two, three, four, or all five of them, as the case may be.

If, from the action of five interests of as many different species on one side, while

there is but one that acts on the opposite side, the inference of the preponderancy of the five over the one is not conclusive; much less can the opposite inference be so, the preponderancy of the one over the five. On this subject, though no just inference fit for the guidance of judicial conduct can be deduced from numbers, yet if it were necessary to frame such an inference, the one nearest to truth would be that which should pronounce the chance in favour of the preponderancy of the five to be as 5 to 1.

As the conformity or disconformity of a man's testimony to the line of truth, will, in relation to each distinguishable fact, depend upon the clear amount of the aggregate force of interest acting upon it in relation to that fact, — and that amount will depend upon the difference between the sums of the forces on both sides; it is equally the business of the judge, (in order to enable himself to form a right judgment concerning the credence due to the testimony), to bring to light all those interests. To confine his consideration to any one of them, would be as effectual a means as he could employ, were it his desire to be deceived.

The testimony of every man being at all times exposed to the action of the tutelary, the mendacity-restraining interests, some or all of them; while his being exposed to the action of any interest acting in a sinister direction, acting in the character of a mendacity-promoting interest, is but matter of accident; it follows that in the case of any given witness, (antecedently to, or abstraction made of, his particular situation and circumstances), truth

is, in every part of his testimony, more probable than falsehood. The only interest he has, acts, on this supposition, on the side of truth.

On this supposition, the absence of mendacity, and even of bias, is on his part certain. The truth of his testimony would also be equally certain, were it not for the infirmities to which, in the character of a witness, the intellectual part of every man's frame is liable; viz. 1. original mis-conception or non-perception; 2. subsequent oblivion or mis-recollection; 3. mis-expression.

So many different facts as there are, that it falls in a man's way to speak of in the delivery of his testimony; to the action of so many different groups of interests may it happen to his testimony to be exposed.

A consequence is, that the testimony of the same man may be true in some parts, false and mendacious in others.

Where a man's testimony is not exposed to the action of any interest acting in a sinister direction, he will either have no wish at all in relation to the event of the cause, or if he has any wish, it will be on the side of truth and justice.

If, at the same time that it stands exposed to the mendacity-restraining force of the tutelary interests, it is exposed to the force of any interest or group of interests acting in a sinister direction, his wishes will be on that side: and his testimony, if true, will *pro tanto* have run counter to the current of his wishes. If, at the same time, it is exposed to the force of any particular occasional interest acting on the

same side with that of the standing tutelary ones, there will then be interest against interest; and his wishes will be on the one side or the other, according to the comparative force of the contending masses of casual interest.

When the testimony of a man is delivered, in a cause in which he is a party concerned in interest; in respect of every fact which, to his eyes, presents itself as of a nature to exercise an influence on the event of the cause, his testimony is exposed to the action of interest in a sinister direction; and by whatever part of his testimony (if any) a fact is asserted, the tendency of which is to contribute any thing towards causing the suit to terminate to his disadvantage, that part of his testimony runs counter to the current of his wishes. As often as this is the case, (*i. e.* that a fact possessing such a tendency is disclosed by his testimony,) there is, in regard to every such fact so asserted by him, a certainty that the disclosure of it has not been brought about by the action of any sinister interest; and therefore, that, if not true, it is at any rate not believed by him to be false: and that the falsity (if there be any) is the result not of any sinister interest acting on the will, but of some infirmity, (as above) the seat of which is in the intellectual branch of his frame. In so far, therefore, as the testimony a man gives is of a nature to operate to his disadvantage, it presents a stronger reason for its being regarded as true, than can be presented by testimony to the same effect by any other person. As far as a man's testimony makes against himself, it produces naturally on the mind of the judge a stronger

persuasion of its truth, than can be produced by the testimony of any extraneous witness.

To gain credence for a fact which, true or false, has been believed by the witness to be true ; instances have sometimes happened, where, by his testimony, he has deposed to facts, of the falsity of which he himself was conscious at the time.\*

Hence another consideration, helping to shew the weakness of the inference, that, because in one part of his testimony a man has been false, even to mendacity, therefore in all the other parts of his testimony he has also been false : the erroneousness of the rule, False in one thing, therefore in every thing ; or, Once false, and always false.

Without being mendacious, it may happen to a man's testimony to be false ; and that, too, even in consequence of the action of interest : this is the case of *bias*.

By the force of bias, understand the force of

\* To apply this to religion. In perhaps all religions there have been sham miracles performed, and false accounts of miracles never performed. But, from a man's having joined in the performance of a sham miracle, or fabricated an account of a miracle known by himself never to have been performed, we are not to conclude that in each instance he has disbelieved the existence of miracles of earlier date, said to have been wrought under the same religion. These miracles (says he to himself) are true ; but at the present conjuncture they do not produce that general conviction which it were so much to be wished they did. Let us aid the efficacy of truth by a pious and useful falsehood.

By whomsoever else such policy may be condemned, it can never with any consistency be condemned by any of those lawyers, who, on such an infinite variety of occasions, and without any assignable specific use, have given invention, currency, or support, to so many pernicious falsehoods.

any interest acting on his testimony in a sinister direction, and in such manner as to produce, on the part of such his testimony, a departure from the line of truth, but a departure such as he is not conscious of.

Falsehoods produced by bias, are such, and such alone, of the falsity of which, he by whom the false testimony is delivered is not conscious at the time.

It is not every sort of falsehood, that a man is capable of uttering, or at least apt to utter, without being conscious of.

The sorts of falsehoods into which a man is most apt to be led are the following, viz.

1. Negative falsehoods; falsehoods consisting in the denial of some fact or circumstance which in reality took place.

A man's attention is, in a great degree, at his command: which is as much as to say, under the direction of his wishes. What, on any account, he finds a pleasure, an unmixed pleasure, in attending to, he attends to of course: what it gives him pain to attend to, (understand, a clear balance on the side of pain), he withdraws his attention from; unless the pain produced by the perception be so great as to divest him of the command he possesses over his attention in slighter cases.

2. Falsehoods in degree; or, in other words, falsehoods of exaggeration: falsehoods respecting degree, viz. in number, weight, or measure. Of the exact degree he has no recollection, of the correctness of which he is himself persuaded: if he has, the falsity is mendacity, not the pure result of bias. He is fearful of departing from the truth, to the prejudice of that side

to which his wishes are attached : by this fear he is driven into an error on the opposite side, an error to the prejudice of the opposite side. Suppose the falsity consists in representing the degree greater than it is. Under the apprehension of representing it as less than the reality, he has represented it as being greater. The considerations which pleaded in favour of increase being conformable to the bent of his wishes, being agreeable to him, being sources of pleasure, the force of his attention was directed upon them, since it went to increase that pleasure. On the other side, pain being the consequence and accompaniment of the attention, the attention as naturally turned aside from it.

## CHAPTER III.

OF PECUNIARY INTEREST, CONSIDERED AS A  
GROUND OF UNTRUSTWORTHINESS IN TESTIMONY.\*

IN estimating the force of a pecuniary interest in its action upon the testimony of a man,

• If the slight sketch, in the way of instruction, here given, be of use with reference to the present purposes, so will it for the purpose of divers other operations performable on the field of judicature: as, for example:

1. Liquidation of the quantum of punishment, when (in part or in whole) pecuniary.

2. Liquidation of the quantum which, in the name of satisfaction for loss, with or without injury, a plaintiff ought to receive.

3. Liquidation of the quantum which, on the same score, a defendant ought to be compelled to pay.

For, on this ground, the views of the judge will be incomplete and partial, if (where the importance of the cause warrants it, and the difference of circumstances is considerable) the circumstances on both sides be not taken into the account.

4. Adjustment of the pecuniary burthen proper to be occasionally imposed on parties, extraneous witnesses, or third persons, in the course of procedure, rather than that failure of justice or misdecision should take place. See Book IX. Part II. CASES IN WHICH EXCLUSION IS PROPER. Chap. 2 and 3. *Vexation and Expense*.

On all these accounts taken together, a complete and carefully constructed set of instructions on this head would,

whose character in respect of probity is not taken into consideration, two main points are to be considered.

1. The value of the respective interests in themselves.

2. The pecuniary circumstances of the person.

In estimating the value of a pecuniary interest, four points are to be considered.

1. The magnitude of the sum by which it is represented.

2. The value of it in respect of time, *i. e.* according as it is in possession or not in possession.

3. If not in possession, the value of it in respect of certainty, according as the interest is vested, or the possession depending for its commencement upon contingencies.

4. The duration of it: in respect of which (in so far as the interest is represented by a sum of money) perpetuity, unless any thing be specified to the contrary, is supposed.

In whatsoever shape the property creative of the interest happens to be; — where (for the purpose of comparison with another interest) any correct estimate is to be formed of it, they must, if not already existing in the shape of a sum of money, be reduced to that shape.

The value, and consequently the mendacity-promoting force, of a pecuniary interest, the money not being in hand, is less and less, in

in every code of procedure, be a fit and useful, not to say a necessary, document.

The present pretends to no other character than that of a sample, and imperfect outline.

proportion as the time at which it is to be in hand is more and more distant.

So, (the time at which, if at all, it is to come in hand, being given), in proportion as the event of its coming in hand is more or less uncertain : *i. e.* in the proportion between the number representative of the chances against its coming in hand, and the number representative of the chances in favour of its coming in hand.

In regard to uncertainty, a distinction must be noted between the case where the event depends merely upon physical causes, not depending in ordinary cases upon the will of man, (such as the death of Titius before that of Sempronius); and the case where it depends wholly or partly upon moral causes, (such as the will of Titius or Sempronius). In the former case, the interest will in general have a rateable value; and the force of it may be rated at the sum which, if sold, it would (as supposed) produce. In the other case, it cannot, generally speaking, have any rateable value; and yet the force of it, when acting upon testimony, may be little different from that which it would act with, were the receipt of the sum regarded as not subject to uncertainty.

Suppose a son, the only child of his father, the father a widower, and beyond the age at which it is usual for men to marry, or, if married, to beget children: the estate of the father at his own disposal, not assured to the son by law: of the disposition of the father, in respect of amity towards the son, nothing known, therefore amity to be presumed. At market, the interest of the son in the property in possession of the father (he not joining in the sale) would

not be saleable. Yet, suppose the title of the father to the whole estate to be in dispute, and the son examined as a witness : the force with which the mendacity-promoting interest created by the value of the estate, acted upon his bosom, would not be in this case materially less than what it would be had the estate been assured to him by law, viz. to be received by him after and upon his father's decease.

In like manner, (even setting aside whatever interest might in this case be constituted by the tie of sympathy), the force with which their respective interests in the estate acted on their respective bosoms, would not, in the bosom of the son, be diminished by a sum so great as the sum representative of the value of the estate for and during the father's life; inasmuch as, during the life of the father, the son is naturally a sharer in the advantages attached to the father's property, notwithstanding the legal dependency of the quantum of that share upon the father's pleasure.

In a rough way, and even in a way sufficiently adapted to divers other purposes, the state of a man's circumstances may be expressed by the difference between the saleable value of his property in hand, and the sum of the debts (including pecuniary obligations of all sorts) to the discharge of which he stands bound.

But, for the purpose of estimating the seductive force with which a given mass of pecuniary interest may be considered as acting on a man's testimony, several other circumstances will require to be taken into account, viz.

1. The state of his pecuniary circumstances

in respect of present exigency, or the proportion between present need and present means : and this, whether the sum in question be needful for the purpose of procuring greater profit, or of saving him from greater loss. Remember, to this purpose, the story of Esau, who, under the pressure of hunger, sold his birthright for a mess of pottage.

2. Proportion between his exigencies, in respect of domestic relations, and his pecuniary means ; according as the effect of such relations is to charge him with pecuniary obligations, or to afford him pecuniary support. Whether the proposed witness be of the one sex or the other ; be unmarried or married ; be childless or have children, and in what number, and whether arrived or not arrived at a state of self-maintenance ; whether they be respectively of that sex which has fewest wants and most resources, or of that which has most wants and fewest resources ; with what other relations (if any) in any of the lines of natural relationship, descending, ascending, or collateral, the witness has any connexion, contributing, as above, to augment the sum of his resources on one hand, or that of his exigencies on the other.

3. Proportion between his pecuniary means (viz. the clear amount of them, after addition of the amount of domestic supplies, and deduction of the amount of domestic charges, as above), between his pecuniary means thus explained, and his exigencies (if any) in respect of political station in life : since, of two persons with the same quantum of clear pecuniary means, one, low in rank, may be in a state of affluence, another, high in rank, in a state of indigence.

4. Habitual rate of expense is not in this respect altogether without its influence. Two men, in pecuniary circumstances in every respect equal, the one habitually spending his whole income, the other but the half of his;—a sum to a given amount, whether coming in, in the shape of extraordinary gain, or going out, in the shape of extraordinary loss, will be apt to find the testimony of the non-saving man more sensible to its influence than that of the saving man.

For the guidance of the judge's mind, in the formation of his estimate of the trustworthiness of the deponent's testimony, it will in most cases not be worth while for him to subject either the deponent or himself (not to speak of extraneous witnesses) to the vexation attached to a chain of investigation thus particular and intricate. But there are cases in which it may: and since it will often happen that, of the above particulars, a number more or less considerable will come to light in the course of the cause, as it were of themselves, or without any trouble worth regarding, on this account it seems desirable that the influence of them should be habitually present to the mind of the judge.

The sum in question,—and a man's sensibility to pecuniary influence, in so far as it can be collected from circumstances of an external nature (as above),—being both given; the influence of the same sum will be greater, much greater, in the case of its going out of hand, in the shape of antecedently unexpected *loss*, than in the case of its coming into hand, in the shape of antecedently unexpected *gain*.

Value of a man's property to-day, say 1000*l.*: sum at stake upon his testimony, 500*l.* Let this sum be taken from him to-morrow, the amount of his property to-day is twice as great as what it will be to-morrow. But let this same sum be given to him to-morrow, the value of his property to-morrow will not be twice as great as it is to-day.

But suppose that it even were twice as great: the matter of wealth is of no value, but in proportion to its influence in respect of happiness. Multiply the sum of a man's property by 2, by 10, by 100, by 1000, there is not the smallest reason for supposing that the sum of his happiness is increased in any such proportion, or in any one approaching to it: multiply his property by a thousand, it may still be a matter of doubt, whether, by that vast addition, you add as much to his happiness, as you take away from it by dividing his property by 2, by taking from him but the half of it.

In many instances there will be a difficulty in deciding, in the case of receipt of money, whether it be to be placed to the account of gain, or of exemption from loss: and, in like manner, in case of disbursement, whether to the account of loss, or of non-receipt of gain. Of this difficulty, when it occurs, it concerns the judge to be aware: but there are many instances in which it has no place.

## CHAPTER IV.

OF INTEREST DERIVED FROM SOCIAL  
CONNEXIONS IN GENERAL.

GAIN or loss may be expected either from the compulsory operation of law, or from the uncoerced conduct of individuals.

The value of the sum at stake being given, and the degrees of proximity and certainty respectively attached to the receipt or loss of it being given; whether it be from the dispensations of law that the assurance of acquisition or loss is derived, is a question, the answer to which makes (it is evident) no difference in the value of the interest, nor thence in the force with which it is likely to act upon testimony in the character of a mendacity-promoting or mendacity-restraining motive.

If (in respect of the value of the interests created, and the force with which they respectively act upon testimony) acquisition and loss when considered as resulting from the dispensations of law, are in general superior to acquisition or loss to the same amount when expected from causes with which law does not interfere; this superiority is far from being constant or universal. Of the operations of law the effect can never be so prompt as the effect

of operations in which the law has no concern is in many instances. And, how necessary soever the coercive and protective force of law may in general be, to the giving to men's possessions a degree of certainty not derivable from any other source; yet, in many instances, acquisition or loss looked to from this or that source, will appear to a particular individual still more certain, as well as prompt, than any acquisition or loss to the same amount that could have been expected by him from the hand of law.

For years together a journeyman has been employed by the same master at a guinea and a half a week: from any other master he would not expect to get above one guinea a week: it is in the power of the master, any Saturday evening in the year, to break off all connexion with him on paying him the guinea and a half for his week's work. Says the master to the journeyman, on Friday next you are to appear in such or such a court: if, on that occasion, you do not give testimony to such or such an effect, the wages you receive the next day will be the last wages you ever receive from me. Who does not see that the force with which a threat to this effect acts on the testimony, will be greater than if, in the event of his giving a testimony opposite to that required of him as above, he were to incur a legal debt to the amount of twenty-six guineas (a year's extra wages), he not being destitute of the means of paying it?

Vary the case, by substituting for employer and journeyman, customer and dealer: both of these in the condition of masters: the result, in respect of the action of the interest on the

testimony of the witness, will not be materially different.

Let the event, on which the supposed debt of twenty-six guineas attaches upon the journeyman, be this, viz. that of the master's gaining the cause. Here, then, is an apparent interest, appearing to act upon the witness in such manner as to incite him to testify *against* his master, though it were at the expense of truth; while yet, in fact, he is incited to testify *in favour* of his master, by an opposite interest, which, though perhaps not apparent, is much stronger than the apparent one.

Ties of this sort are alike obvious and numerous. In point of force,—even supposing the interest created in each instance to be a mere pecuniary interest, unfortified by any mixture of sympathy,—it is no more susceptible of any determinate limits, than the interest constituted by a liquidated sum payable on the spot. If, then, to the exclusion of these less conspicuous but not less powerful ties, the judge were to keep his eye fixed on the interest constituted by a liquidated pecuniary sum, he would be in a way to be continually deceived.\*

If, in the cases where it is thus, as it were, latent and unobtrusive, the single force of pecuniary interest is capable of rising to a level with any to which a conspicuous interest of the

\* In virtue of the existing exclusionary rules, this state of constant deception has been, time out of mind, the lot of English judges. But, the mischief falling exclusively upon the party in the right, while the advantage of it is shared between the party in the wrong and the firm in which the judges are the acting partners, no deception (it has been seen) was ever submitted to with a more unruffled acquiescence.

same kind is usually wont to rise; much more is it where it happens to it to be corroborated by the force of sympathy.

In this situation, in the ordinary state of things, are to be found the several descriptions of persons who stand connected with others by the ties of natural relationship.

1. The child, with reference to the father, or mother, or both.

2. Any person junior in age, by whom expectations are entertained from the bounty of a relation senior in age; whether in the simple ascending line (as grandfather or grandmother), or in the double or collateral line (as uncle or aunt in any degree, or their descendants in any degrees).

Exclusive of the complex interest composed of a mixture of pecuniary interest and natural sympathy, is the interest which has place where the one of the parties is subject to the direction and government of the other.

The case in which this sort of interest is capable of existing in its purest state, unmingled with any of the other interests that are so naturally connected with it, is that which, in the bosom of the ward, is created by his dependence on the guardian. Pecuniary interest, howsoever accidentally combinable with it, belongs not to the case: and as to sympathy, if it be a natural accompaniment, neither is antipathy an unnatural one: at any rate, if it be supposed that upon an average there is a balance on the side of sympathy, it cannot be supposed that this balance can, in its amount, approach near to that which has place in the more ordinary case, where the relationships of

guardian and parent are combined in the same person.

Now the interest created by dependance on natural domestic power, of what is it composed? Of the fear of pains of many kinds, added to the hope of pleasures of most kinds.

The interest capable of being created in the bosom of the domestic subordinate, by his dependance on his correlative superordinate, is so obvious as scarcely to require mention, though it were only in the way of memento.

The interest capable of being created by the same relationship in the bosom of the superior,—this interest, howsoever obvious, is somewhat less obvious than the interest created in the correlative and opposite case.

In general, and throughout the circle of domestic relationships, the social interest, the interest of sympathy, is apt to exist in greater force in the bosom of the superordinate, than in the bosom of the subordinate: in the bosom of the parent, than in the bosom of the child; and so on through the string of more and more distant relationships, which are, as it were, the images, fainter and fainter the oftener they are transmitted or reflected, of the relationship betwixt parent and child. Of this disparity, the cause is to be found in the pleasure of power peculiar to the parent, and in which the child, though the source of it, has no share. If in this or that instance the balance be reversed, the cause is to be looked for partly in the superior sensibility of youth, partly in the idiosyncratic temperament of the individual.

But besides this social interest, the relationship of the superior to the subordinate is sus-

ceptible of giving lodgment to an interest of the self-regarding kind, which must not be overlooked. In the case of parent and child, the superior stands bound by a variety of ties to make provision for the sustenance of the subordinate. But, the more of his sustenance the child draws from sources other than the pecuniary funds of the parent, the less is the quantity by which it is necessary he should diminish the amount of these funds. As often, therefore, as money is at stake in a suit to which the child is party and the parent a witness,—the interest to the action of which the testimony of the witness is exposed, adds to the universally-operative social interest an interest strictly pecuniary, an interest of the self-regarding kind. And so, in regard to all persons standing in this respect in the place of parents: allowance being made for the comparative faintness of the obligation, legal or moral, in their respective cases.

An interest exerting its influence on testimony, is alike capable of being created by the hope of good, and by the fear of evil. On many occasions, the object being given, hope and fear looking to that object run into one another and are undistinguishable: for when a good of any kind has been habitual in a degree sufficient to keep up expectation of its continuance, it is difficult to say to which of the two denominations, hope or fear, the expectation entertained in relation to it ought to be referred in preference: to the hope of retaining, or to the fear of losing it. In a more particular degree, the observation holds true in regard to that particular species of good, which is com-

posed of, or has for its efficient cause, the matter of wealth: money, money's worth, and whatever may be to be had by means of money.

Here and there, perhaps, a mass of interest may be found, consisting of the fear of evil, without any hope of good; a mass of interest having no connexion in any way with the matter of wealth. Suppose two persons in office, military or unmilitary; the one, to some purposes, under the direction of the other; from the favour of the superior, the inferior is not in the habit of deriving, nor in the way to derive, money or money's worth: on the part of the inferior, therefore, the fear of evil (if it exists) exists in a state of relative purity, unmixed with the hope of good. Suppose then (what is generally the case), that without committing himself in any way (*i. e.* without subjecting himself in any degree to legal punishment, or even, to appearance at least, to any certain and decided portion of shame), it is in the power of the superior to inflict habitual vexation on the other: the force of this vexation, is the force with which the will of the superior is capable, in an influential way, of acting on the conduct of the inferior, on any such occasion as that of delivering testimony, as well as on any other.

Let the degree of vexation thus producible be such, that whereas the official emolument of the inferior is equal to 100*l.* a year,—to rid himself of this vexation, he would be content to render, under another superior, the same official service for 20*l.* a year less. On this

supposition, the non-pecuniary interest by which the testimony of the inferior may be acted upon in any direction, proper or sinister, is equal to a pecuniary interest constituted by the eventual assurance of a loss (he having the means of sustaining it) equal to the present value of an annuity of 20*l.* a year for his life ; at twelve years' purchase, say 120*l.*

In the case of these several relationships, comparison being made between sympathy and antipathy,—sympathy will naturally be regarded as the sort of affection predominant, on an average : the balance of such affections as are not of a self-regarding nature will naturally be looked for on that side, and as adding its force to whatever may happen to be exerted by the pecuniary interest, and the other self-regarding ones.

But it would be a gross oversight, and a copious source of deception to the judge, if (to the purpose of judging of evidence, or to any other purpose,) he were to be altogether unaware of the casual predominance of the dis-social affection of antipathy, even between the nearest relations. On a variety of occasions which force themselves upon his view, he beholds the marks and fruits of their antipathy in the suits to which they are the contending parties : and well may he conceive that the cases in which the antipathy thus manifests itself, form but a part, and that a small part, of those in which it exists, and that in a degree capable of exercising on testimony a sinister influence.

The inference, therefore, which is to be

grounded on the several relations, domestic and political, is,—a general presumption of mutual sympathy,—stronger or weaker according to the nature and degree of the relationship,—but, on every occasion, liable to be rebutted by special evidence.

## CHAPTER V.

OF INTEREST DERIVED FROM SEXUAL  
CONNEXIONS.

I. THE superiority of the interest which the relation of husband and wife is capable of creating, when compared with the interest capable of attaching itself to any of the others, is too obvious, and too clear of dispute, to need bringing to view by any special observations.

The only particulars to which, on the subject of this relation, it can ever happen to need bringing to view, are the cases forming so many exceptions to the general rule: the cases in which the interest commonly attached to this relation, and acting on testimony in a correspondent direction and with a correspondent degree of force, may happen to act with an inferior degree of force, though in that same direction; or even in a direction plainly opposite.

The general rule is too obvious to admit the possibility of the judge's regarding it in any case with a degree of attention inferior to that which is its due. On this occasion, as on others, one great use of a body of instructions from the

legislator to the judge, is the preventing him from seeking, in the cover afforded by general rules, a cloak for imbecility, or indolence, or negligence, or indifference, or partiality, or corruption of a still grosser nature:—in the present instance, for affecting to see an influencing interest where there is none, or to see such interest where there is an opposite one; for presuming the bias of the witness to be on one side, when the facts in the cause, if he chose to look at them, would shew it to be acting on the opposite side.

A suit or cause, criminal or civil; the husband, plaintiff or defendant: on his side, or on the opposite side, the testimony of his wife is called in. If nothing else appears in the cause than that she is his wife;—if, of the terms on which (in respect of amity or the contrary) they live, no special indications present themselves,—nothing but the existence of the matrimonial relation;—the ordinary degree of affection must, and will of course, be understood to subsist.

But this presumption ought to be understood as capable, for this purpose, to be rebutted at any time, by the proof of special facts indicative of the contrary: such as separation, whether by consent, or by authority of law; elopement, on the part of the wife; habitual and open adulterous cohabitation, on the part of the wife, in a house separate from that of the husband.

But neither should these indications, howsoever strong the presumption which they afford, be regarded as conclusive evidence of the absence of all interest.

Separation will not take away the pecuniary interest which the wife has in the gain or loss that may happen to her husband, unless her maintenance is fixed, has been so for a length of time, and all intercourse between them has ceased: nor even then altogether, since pecuniary loss on the part of the husband would in some cases disable him, wholly or in part, from affording such maintenance.

Notwithstanding separation, elopement, or adulterous cohabitation still subsisting, the common interest may have regained its original force, if from other incidents there appears reason to believe that a reconciliation has already taken place, or is likely to take place.

The interest, and its influence on the testimony, depending not on the outward and factitious bond or symbol of connexion, a token given at some distant point of time,—but upon the affections prevalent in the bosom of the witness at the very time of the utterance of her testimony; whatever indications of a contrary interest happen at that time to present themselves, present the same demand for the judge's attention as any other evidence by which the trustworthiness of testimony may be affected.

On this occasion, however, it concerns the judge to keep his attention open to two circumstances.

1. One is, that,—where the importance of the cause, in its own nature or in the eyes of the party or witness, is such as to create an interest capable of supporting them under the trouble of the imposture,—appearances of dissension,

and even enmity, between the husband and the wife, may be put on, for the purpose of rebutting the presumption of conjugal partiality, and thence gaining for her testimony a degree of credit beyond what properly belongs to it.

2. Another is, that whatsoever ill-humour or antipathy may be really prevalent at the time, the pecuniary interest (a self-regarding interest, an interest in a considerable degree inseparable from the legal obligations attached to the connexion,) remains on the other side to oppose its force to that of the dissocial interest: so that unless the case be such that the disadvantage that would fall on the husband in consequence of the loss of his cause, would have no material effect on his purse, her testimony will not, by any such disagreement, be divested of all bias in favour of his side of the cause; unless (as is sometimes the case between adversaries, *e. g.* in all acts of aggression so open as to expose the aggressor to inevitable punishment,) her antipathy for her husband has for the moment become stronger than her regard for herself.

The estimation in which a woman is held, is apt to be more or less disadvantageously affected, when, after her having cohabited with a man in the character of his wife, a discovery is made that there was no marriage, or that for some cause or other the marriage was void. In general, therefore, were no other interest at stake than the interest of her reputation, in a cause in which the fact or validity of the marriage were in question, the testimony of the wife, if examined on that side, would be drawn by a strong bias to the affirmative side.

Yet cases are not wanting in which the bias would be still more incontestably on the other side. For example, where the wife is prosecuted for bigamy. If she can induce a persuasion that the supposed former marriage never took place in fact, or was not legal, she thereby exempts herself from whatever punishment is attached to that offence.

In adultery on the part of the wife, concealment is commonly an object with both delinquents; and so far as it is preserved, reputation remains unaffected. But open adultery is likewise not without example; nor is the case without example, in which, for the purpose of divorce, proofs of the transgression have been purposely furnished by the wife.

In a cause in which the husband is a party, concealed adultery on the part of the wife cannot with reason be regarded as a circumstance diminishing in any considerable degree (much less destroying) the complex and powerful interest by which the testimony of the wife is drawn towards the husband's side. The unity of pecuniary interest, and of that sort of reputation which is attached to condition in life, remains unimpaired. With ill-will, in any degree, the transgression has on her part, though a most natural, not a necessary, connexion, either in the character of cause or in the character of effect. Friendship may remain unchanged. The only thing certain, is, the existence of a man in whose society she has reaped a sensual gratification, which (by reason of absence, or debility, or indifference, or estranged appetite, or inferiority in personal accomplishments,) she has failed of experien-

cing in the arms of the man to whom she is joined by law.\*

For rebutting the presumption of partiality created by the legal connexion,—a partiality in general little inferior in strength to that which either, being alone, would feel for his or her own cause,—the judge will naturally carry to account whatsoever counter-indications happen in any case to present themselves. But it is seldom that the utility of such lights, with reference to truth, and security against deception and consequent misdecision, will be important enough to outweigh the vexation, expense, and delay—more particularly the vexation—that would naturally be inseparable from an inquiry carried on for that special purpose.

Cases, however, warranting and prescribing such inquiry, are not altogether out of the natural course of things. Suppose a homicide, and the husband under prosecution for the murder. In the ordinary state of things, and to judge on the ground of general presumptions, the testimony of the wife should be little less partial to the husband's side than his own

\* Among the Lacedæmonians and Romans, though adultery was no more dispunishable than horse-stealing, a man would lend his wife to a friend as he would his horse. To whatsoever degree illaudable, the custom does not the less prove the rashness of any opinion that should regard adultery on the part of the wife as a proof of the extinction of that partiality, by which, in a cause in which the husband is party, her testimony will naturally be drawn towards the husband's side.

[In France, before the revolution, the effect even of notorious adultery in diminishing that partiality was as nothing.—*Editor.*]

would be. But cases have happened, in which a wife, by herself, or in conspiracy with others, has been concerned in the murder of her husband; and the case may be, that bearing towards her husband a degree of ill-will strong enough to have determined her to the enterprise of ridding herself of him by such flagitious means, (her husband being innocent of the crime, and known by her to be so,) her design is to employ her testimony to the purpose of procuring him to be convicted. In this case, the prevention of the tremendous calamity of judicial homicide may depend on a scrutiny into the particulars of the habitual intercourse between the husband and the wife.

II. For the particular purpose here in question,—for the purpose of judging of the influence of social connexion upon testimony,—it will not always be easy to say whether, in the case of the female testifying in a cause in which the male is a party, the action exerted on the testimony by the interest resulting from the connexion, is likely to be most powerful in the case of the wife, or in the case of the concubine.

In the case of the wife, the bond of connexion (excepting in the extraordinary case of divorce) is perpetual: in the case of the concubine, it may be dissolved at any time, at the pleasure of either of the parties.

But, in the case of the concubine, the proof of sympathy borne to her by the male is more conclusive than in the case of the lawful wife: for if no such affection existed, the probability is, that he would not maintain her in that character:

whereas in the case of the wife, though aversion had taken place of amity, she would not be the less his wife.

On the other hand, again, the point in question here is not the affection of the male as towards the female, but the affection of the female as towards the male. But, of the affection on the part of the female towards the male, the existence of the sexual connexion is comparatively but a remote article of evidence. Without affection on the part of the male, the connexion would not continue: but it may continue without any affection on the part of the female; since her means and even prospects of subsistence may depend upon it. It may be, that from the first the sentiment never had existed: perhaps, having originally existed, it has become extinct: perhaps it has not only become extinct, but given place to the opposite sentiment, antipathy.

Let the cause in which the male is a party be of the number of those in which money is at stake. Let it be considered, in this particular case, what differences are presented between the situation of the wife and the situation of the concubine.

In the ordinary state of things, the interest of the wife in this case is identified with the interest of the husband. Sharing together, and in the company of one another, the common property, (though in proportions in some degree dependent on the pleasure of the stronger party), the gain of the husband is the gain of the wife, the loss of the husband the loss of the wife. In the case of the concubine, the identity

wants much of holding good, since the connexion may be dissolved at any time.

But whether there be gain or loss, the wife will be still the wife. In case of gain, her share in the additional mass will not be apt, in her expectation, to differ from the share she had been accustomed to occupy in the original mass: and so (*mutatis mutandis*) in the case of loss, her share will be, in her expectation, naturally in the same proportion.

On the other hand, in the case of the concubine, the gain (if to a certain degree considerable) may, in her expectation, be liable to excite his thirst for pleasure, and send him in search of more agreeable connexions, either in the same way, or in the way of marriage: but, moreover, in case of loss, the loss (if to a certain degree considerable) may render the pecuniary burthen too heavy to be borne by one who has it in his power to rid himself of it at any time.

One case there is, in which it is but natural that the interest of the concubine should act with much more force on her testimony, than the interest of the wife on her's. This is where, though the marriage has not been dissolved to the purpose of giving room for another marriage, the wife lives separately from her husband, and at a fixed allowance. In this case, be the gain of the husband what it may, the expectation of sharing in it is not likely to have place in the bosom of the wife: whereas, in the bosom of the concubine (unless where the gain appears considerable enough to excite new projects), an expectation of a share in the

concern will come of course. As to loss, in the bosom of the concubine the prospect of it will excite a double apprehension: the apprehension of seeing her share diminished, and the apprehension of experiencing a total dissolution of the connexion from which it should have flowed. But to any such loss the separated wife may be comparatively indifferent; unless among the effects of it be that of trenching upon her separate maintenance.

Two obvious circumstances there are, by the force of which the condition of a concubine is gradually led towards a coincidence with the condition of the wife. One is, the birth of children: especially when, by their continuance in life, their existence adds every day to the force of the bands by which their parents were united in the first instance: the other is, the duration of the connexion between the parents themselves.\*

Where the importance of the cause is such as to warrant the inquiry, the judge will perceive that the force with which an interest of this nature is capable of acting upon testimony, has at least as good a chance to be taken into the account as that of any interest of a nature merely pecuniary, expressible by a definite sum, liable to be gained or lost by the testimony according as the result of the

\* Of this latter circumstance such is the force, that, under the laws of some countries, cohabitation, without further proof, unless it be the acquiescence of the man in the assumption of his name by the woman, is regarded as possessing, to that purpose, whatsoever force has been given by law to the prescribed solemnities.

cause is in favour of the one party or the other.

From the addition of any other interest or interests operating in the same direction, (be their force what it may), pecuniary interest cannot but receive additional strength and efficacy. And if, in the case of a pecuniary interest derived from this or any other of the social relations, the quantum is not so apt as in the case of a simple pecuniary interest, to be susceptible of liquidation, of being expressed by a determinate sum; the force with which it is apt to act on testimony is scarcely on that account the less considerable. Of a sum not liquidated by any arithmetical process, the dimensions are left to be adjusted by the imagination; and in a case of this sort, the imagination is not less apt to err on the side of increase than on the side of diminution.

The relation of concubine to keeper is not recognized by the laws, or it would not be what it is; it would be changed into that of wife to husband. In some countries it has been, in any country it is capable of being, taken for a ground of punishment. That which the legislator is disposed to punish,—that which he would wish to prevent,—that which he would prevent if it were in his power, and if the mischief of the coercion necessary to prevention would not outweigh the mischief of the obnoxious practice,—cannot be regarded with satisfaction by the legislator, nor ought in general to be so by the judge. But in his displeasure, how strong soever it be, neither the one nor the other will find any sufficient war-

rant for withdrawing their attention from the object by which it is called forth: from the object, or from the effects, good or bad, which flow from it on all sides.

Where the existence of such a connexion is taken for a ground of punishment, it might be a severe task upon the sympathy of the judge, were it out of his power to form his opinion relative to the existence of such a connexion for the purpose of judging of its influence upon testimony, without proceeding to apply such his opinion to the same fact considered in the light of an act of delinquency, and thereupon to apply punishment in consequence. Fortunately, no such collateral conclusion need be formed. To warrant the application of pure punishment, — of a suffering which produces not, on the part of any other individual, any enjoyment to counterbalance it, — stronger and more cogent proof is requisite, than in the case in which that which passes out of the hand of one man in the shape of loss, passes into the hand of another man in the shape of gain; insomuch that, by the transference, though something in the way of happiness, yet not every thing, is lost upon the whole. For the purpose of punishment, neither community of abode, nor domination of the female by the male, nor both together, ought to be accepted as sufficient proof, in the character of circumstantial evidence: but, for the purpose of judging of the influence of domestic relation upon evidence, such intercourse may well serve for sufficient proof, subject to the effect of any counter-evidence deducible from other sources.

In the case of concubinage, the common sub-

sistence is, for a variety of obvious reasons, most apt to have for its source the property of the male. Hence, in the relation between keeper and concubine, the station of keeper is (in the ordinary course of language, as in the ordinary course of practice,) referred to the male sex, that of concubine to the female.

Instances, however, in which the parts have been reversed, are not without example; and to the judge, as to the legislator, nothing that can ever happen to call for his attention ought to be strange.

To a case thus deviating out of the ordinary course of things, it seems scarcely necessary that any detailed instruction should be adapted. In what respects this converse case agrees with the ordinary case, will be easily pointed out by *analogy*: in what respects they differ, may, with little more difficulty, be discovered by the light of *contrast*.

III. It remains to consider the simple case of the relation between two lovers.

The passion of love is a passion of the force of which, on other occasions, it cannot well happen to the judge not to be aware: it would be a sad oversight, if, on an occasion of such importance as the one here in question, its influence were to be overlooked.\*

Without any aid from pecuniary interest, the interest created by this passion is capable of rising beyond any height to which pecuniary interest (particularly in a state to act on testimony) has ever been known to arise.

But, in the state of things in which love aims

\* It is completely so by English law.

at marriage, pecuniary interest is capable of adding its whole force.

In the case of the male, the impression made by the personal charms of the female may have risen to any degree of strength; there are no limits to the quantum of the property in possession or expectancy, in which he may be entertaining expectations of possessing a husband's share, and the right to which may be dependent on his evidence; his own may amount to any thing or nothing; nor are there any assignable limits to the load of debt under the pressure of which it may happen to him to labour.

Change the sexes; what difference there may be, will be scarcely worth noting for this purpose. The power which, by marriage, the female acquires over the property of the male, is not in general so great as the power which, by the same contract, the male acquires over the property of the female. In this respect, the force with which the interest created by the relation in question is capable of acting on the testimony of the female, may be considered as suffering some diminution in comparison of the opposite case, though a diminution so precarious, as, on the present occasion, to have scarcely any claim to notice. On the other hand, as property is apt to fall in larger masses into the lap of the male than into that of the female, at the same time that the male is less restrained than the female in his choice, elevation by this ladder has been more apt in the instance of the male sex than in the instance of the female, to have risen to extraordinary heights. From the very lowest origin, females

have been raised by marriage even to the throne. Men, though they have been raised to a station equally high, have never, by that same ladder, been raised from a station equally low.

## CHAPTER VI.

OF INTEREST DERIVED FROM SITUATION WITH  
RESPECT TO THE CAUSE OR SUIT.

IN every cause, each party (except in so far as it may happen to him to be a mere trustee, and not connected by any tie of sympathy with any party having a self-regarding interest in the cause), each party has of course, in virtue of his being a party, some sort of interest in the cause: and, supposing him heard or examined in the character of a witness, the direction in which this interest acts (in so far as it acts with any sensible degree of force) will be in the mendacity-promoting line.

But, independently of legal forms, (such as that which requires the concurrence of trustees who have no self-regarding interest, and perhaps no interest of sympathy, in the cause) it will frequently happen, that the interest which a man derives from his situation in the character of party in the cause, be it on the plaintiff's side, be it on the defendant's side, will be practically imperceptible. This casual minuteness is, however, confined in a manner to the class of cases which exhibit a multitude of parties on the same side: for if a man stands alone, the fact of his subjecting himself to the vexa-

tion and expense incident to litigation, affords effectual proof, that the interest derived from his station in the cause possesses a magnitude sufficient to exert a real influence.

In general, the interest which the proposed witness thus possesses in virtue of his station in the cause, will be the only interest, except that of the standing tutelary interests, to the action of which his testimony will, on either side, stand exposed. But as it may happen to the testimony of any man in the station of extraneous witness, so may it to that of any man in the station of plaintiff or defendant, to stand exposed to the action of any number of casual interests, on either side, or on both sides; and these, each of them, in any degree of force. On any occasion, it may consequently happen, that the force of this standing mendacity-promoting interest shall be counter-balanced and over-balanced by casual interests acting on the other side, that is, in conjunction with the standing tutelary ones. And to any such casually operating interest it may happen, to apply to the whole of the party-witness's testimony, or to any part or parts of it less than the whole; that is to say, one or more of the entire assemblage of facts comprised in it.

Out of this state of things, several anomalies will be apt now and then to arise; of the possibility of all which, it becomes the judge to be advised.

The interest which a party (be he defendant, be he plaintiff) has in the cause, will not, *of itself*, be sufficient to restrain him from giving false testimony to the prejudice of that interest,

if there be any interest to a greater amount that acts upon him on the opposite side. There is no defendant, who, *all other interests apart*, would not yield to an unjust demand of 10%, and even confess the justice of it, if by so doing he were assured of gaining 20%. There is no plaintiff, who, *all other interests apart*, would not desist from a just claim to the same amount, and even confess the injustice of it, for the same recompense.

But, so far from being absolutely certain and uniformly efficient is even the united force of all the tutelary mendacity-restraining interests, that instances might be found in which the slightest casual interest (of the pecuniary kind, for example) acting in a mendacity-promoting direction, has been seen to overcome their united force. The proposition, therefore, which was true, reservation made of the influence of those tutelary interests, may still be given for true, even without any such reservation.

Of the several species and degrees of interest thus attached to the party's station in the cause, there is scarce any one to which, by accident, it may not happen to find itself opposed by a stronger interest, acting in a mendacity-promoting direction, and overpowering it.

Feeble as interests of the social class generally are, in comparison with those of the self-regarding class, there is not of the self-regarding class any interest so high and strong, as not to be liable to be opposed by an interest of the social class capable of overpowering it. Instances have been known in which delinquents

have endured the very extremity of torture, rather than disclose their coadjutors. In England (till comparatively of late years) has existed a practice, in virtue of which, if a defendant in a capital prosecution, on being called upon to say, in general terms, Guilty or Not Guilty, forbore to answer, he was tortured to the very death : but, on condition of his submitting to this infliction, his property, which, in the event of his conviction in the ordinary way, would have been taken from his natural representatives by the king to his own use, was suffered to take its ordinary course. Instances (it is said) have not been wanting, in which men have thus submitted to death, preceded by the extremity of corporal sufferance, rather than expose the objects of their affection to that loss. In this case no falsehood was uttered, nothing at all being uttered ; nor was falsehood, in any shape, conducive or necessary to the purpose. But, inasmuch as an interest of any degree of slightness will sometimes be sufficient of itself to overpower the united force of the standing tutelary motives, the supposition has nothing improbable in it, that, for the same purpose, in addition to the corporal agony, falsehood would not have been grudged.

In the case where men have suffered themselves to be tortured to death, rather than give up their companions in delinquency, falsehood must in general have borne a part. For, in all such cases, the defendant has, in course, been plied with questions ; and an answer denying his having had any such companions will have

been a much more natural result, than a confession of his having had associates, accompanied with a refusal to disclose them.

Even the tutelary interest created by religion, the religious sanction,—notwithstanding the uniformity with which it acts, in opposition to mendacity, on all ordinary occasions,—may (such have been its anomalies) be regarded, without any extravagant stretch of supposition, as capable of driving a man into this transgression, instead of saving him from it. In Denmark (it is said), the country was infested by a set of religionists, in whose conceptions there was no road to everlasting happiness so sure as the scaffold; nor to the scaffold any road, on that occasion, so eligible as that of murder; especially if some child, within the age of innocence, were taken for the subject of that crime. If, in that case, instead of a blood-stained hand, a mendacity-stained tongue had been chosen as the more eligible instrument, the aberration from the line of reason and utility would hardly have been more wide.

The cases above brought to view are all of them out of the ordinary course of things: so much so, that there is none of them of which the existence ought to be presumed, or the supposition of it acted upon, unless the probability of the case be indicated by some special circumstance.

In the ordinary state of things, therefore, the following are the rules that may serve for expressing the comparative trustworthiness of self-regarding evidence.

1. So far as it makes against himself, a man's

own evidence is the best evidence: more so than that of an extraneous witness.

For, in this case, such part of his testimony as has this tendency (that is to say, so much of it as is understood by him to have this tendency) cannot, for any thing that appears, have found any sinister interest to give birth to it. On the other hand, to prevent the utterance of it, had it been otherwise than true, there was the united force of the several tutelary sanctions, strengthened by the accession of the casual interest in question (whatever it be) that is at stake upon the event of the cause: self-preservation against death, if capital; pecuniary interest, if pecuniary and non-criminal; and so forth.

2. So far as a man's testimony makes in favour of himself, it is inferior in trustworthiness to that of an extraneous witness not known to have an interest depending on the credence given to or withholden from the facts asserted in such his testimony.

The following cases, however, present themselves as so many exceptions to these rules.

1. If the interest which the extraneous witness has at stake be of more value than that which the party has by whom the self-regarding testimony is delivered.

2. If, the interest being in both cases equal in value, the party by whom the self-serving or self-disserving testimony is delivered be in point of reputation upon a level superior to the ordinary level: the reputation of the self-serving or self-disserving extraneous witness being on the ordinary level, as is the case where it

happens to be perfectly unknown to the judge.

3. If, the reputation of the party being at the ordinary level, the appropriate reputation of the extraneous witness is decidedly below it: as where it has already happened to him to be convicted of testimonial mendacity (denominated in most cases *perjury*).

The sum at stake, and all other circumstances (as above mentioned) being equal in both cases; the force of the interest will in general be greater upon a *party* testifying in the character of a witness, than upon an extraneous witness: and this on several accounts.

1. In the case of the party,—the suit on which the money depends being actually on foot, and thus far in advance, — the money, if lost, will in general be sooner parted with, if gained, be sooner received, in the instance of the party, than in the instance of the extraneous witness. But if, in this respect, it so happens that there is no difference, then this reason has no place in the account: if the difference is on the other side, then of course the reason operates on the other side.

2. Of a state of litigation, a degree of irritation is a natural, and almost a necessary, accompaniment. By the influence of this irritation, the party is already acted upon; the extraneous witness not yet. This is as much as to say, that the testimony of the party stands exposed to the action of two sinister interests, to but one of which that of the extraneous witness is exposed. If, then, so it happens, that the ill-will borne by the extra-

neous witness towards his antagonist is more intense than that borne by the party to his, this reason fails.

3. To the pecuniary loss necessarily resulting from the loss of the cause, — the loss resulting from the obligation of reimbursing to the winning party his share of the costs of suit, is a natural, though not an inseparable, appendage. In the instance of the party, this ulterior loss is already in immediate contemplation; in the instance of the extraneous witness, not so certainly: because, in the instance of the extraneous witness, it may happen that, no suit being as yet commenced, none will be commenced: for that the demand will either not be made, or will be acceded to without suit. But this reason also is liable to fail: viz. in the opposite case.

On this account, (the sum at stake, and in that respect the strength of the temptation, being the same), the improbability of mendacity will be less on the part of a party on either side of the cause, if there be no extraneous witness on that same side to that same fact, than on the part of an extraneous witness, if it be a fact that is not supposed to have come under the party's cognizance.

The reason is, that, in the case of the party deposing in his own favour, there is, in case of mendacity, but one person to be reconciled to the wickedness, and that himself, without need of confession to any one else: whereas, in the case of the extraneous witness, there is a probability that the suit would not have been instituted or defended (as the case may be).

without a concert between the party and the extraneous witness supposed to be mendacious; which concert supposes, on the part of each partaker in the conspiracy, a confession made of his wickedness to the other; and besides the comparative improbability of it, such double wickedness affords additional chances of detection.

In the situation of party delivering his own testimony on his own behalf, it depends upon any man to originate the opportunity of employing, to a purpose chosen by himself, mendacious evidence: viz. by instituting the unjust demand, or hazarding the unjust defence, and then delivering his own testimony in support of it.

In the situation of extraneous witness, neither the demand is instituted, nor the defence determined upon, by the individual whose testimony is in question. Without the previous act of another person (viz. a plaintiff or defendant), the advantage derivable to the interested testimony cannot be reaped.

In the case of a design to raise money by groundless demands, to be supported by mendacious evidence; a demand to be made by a plaintiff in the character of an informer, (*i. e.* to gain a reward offered by the law, payable in the event of a delinquent's being convicted of an offence), presents a more natural and generally practicable mode of carrying into execution, by abuse of law, a plan of depredation to an unlimited amount, than a demand of money as due on account of any of the ordinary transactions between individual and individual: since

a transaction of that sort can seldom have taken place without some special relation between the parties,—an incident not necessary in the other case.

As between plaintiff and defendant, (to judge from the mere consideration of their respective stations in the cause, and nothing else), in a cause where money is at stake, the probability of mendacity will be greater on the part of the defendant than on the part of the plaintiff.

The reason is, that, in the station of the defendant, (the sum being in both cases equal), the mendacity-promoting interest is constituted by the fear of loss: in the case of the plaintiff, by hope of gain to the same amount. And, sum for sum, as already observed,\* the sufferance from loss is greater than the enjoyment from gain.

But this proportion does not take place, except upon the supposition that the case is such that the defendant has already been established in the habit of regarding the money as his own, the plaintiff not.

Suppose the strength of the persuasion in this respect equal on both sides, the seductive force of the interest will in this respect be equal on both sides: suppose the persuasion stronger on the plaintiff's side, the strength of the mendacity-promoting interest will be greater on the plaintiff's side.

Without pretence of title, conscious of his having none, Rapax has contrived to get possession of an article of property belonging to

\* Suprà, p. 655.

Humilis, confiding in his supposed inability to take upon himself, or to sustain throughout, the burthen of litigation. Circumstances intervening to disappoint the speculation, Humilis seeks his remedy notwithstanding. In this state of things, though, at the commencement of the suit, the subject-matter was in possession of Rapax, defendant, yet, though he lose the cause, his condition will be, not that of a man who has sustained a loss, but that of a man who has miscarried in his pursuit of a gain: while that of Humilis, in the event of his failing in his demand, will be not merely that of a man who has miscarried in the pursuit of a gain, but that of a man who has been struck by an unexpected loss.\*

\* In the above case, by the supposition, Rapax is the wrong-doer, Humilis the party injured, and conscious of his being so: a particular supposition naturally included in that general one, is, that of his being persuaded of the truth of the facts to which he deposes: in which case,—though subject to the action of an interest promotive of mendacity, had he been in a condition to stand in need of such criminal assistance,—yet, not (by the supposition) standing in need of it, the epithet *mendacity-promoting* may appear unsuitable to the case.

But this particular case, though naturally, is not necessarily, included in the general case. Though fully, and with perfect reason, persuaded of the general rightfulness of his cause,—of his demand, or his defence, whichever it be; it may happen, that this or that particular fact to which he deposes shall be not only untrue, but fully understood by himself to be so. Consideration had of the weight of the evidence on the other side, it may appear to Humilis that the cause, though altogether just, may stand in need of an apposite falsehood for the support of it. Whether such support will be given to it or no, depends upon the disposition of Humilis; upon the proportion between the force with which the men-

dacity-restraining interests (the tutelary sanctions), and the force with which his interest in the cause, is acting on his mind at that same time: and to have been, on a particular occasion, innocent and injured, is an accident which is just as capable of happening to a man of the worst disposition, as to a man of the purest virtue.

## CHAPTER VII.

OF IMPROBITY, CONSIDERED AS A CAUSE OF  
UNTRUSTWORTHINESS IN TESTIMONY.

ON the present occasion, the object is, to determine, with what degree of assurance expectations of mendacious testimony in the cause in hand can with propriety be grounded on moral improbity in its several shapes, and in particular in the shape of testimonial mendacity, as manifested on some former occasion or occasions.

Though all men are not liars, (at least on occasions so important as those of judicial testification), yet in that situation all men are almost continually exposed to the temptation of becoming so.

Supposing it certain, that, at the time in which the witness is delivering his testimony, he is not exposed to the action of any mendacity-promoting interest; it is equally certain, that improbity, (in whatsoever shape or degree his disposition be stained by it,) cannot exert any sinister influence on his testimony: that mendacity—wilful and intentional mendacity—is no more to be apprehended from him, than from the most virtuous of mankind; and that, in respect of trustworthiness, between the one

and the other the only difference is, that, in consequence of the habitual influence of the tutelary sanctions, the virtuous man will apply himself to the giving to his testimony that completeness as well as correctness of which it is susceptible, with a degree of solicitous attention, which in the case of the profligate man will find a substitute in indifference.

But it is seldom that any such certainty either presents itself, or can by any scrutiny be acquired.

One case there is, in which the opposite certainty presents itself: that is, where the person whose testimony is in question is a party in the cause: which conspicuous interest is, however, by accident, liable (as before observed\*) to be counter-balanced and even outweighed by other and stronger latent interests acting on the other side.

Another case is, where, though not a party, he has a known and manifest interest in the event of the cause.

In all cases, whether he have or have not any manifest interest in it, he is liable to be exposed (as well in the mendacity-promoting as in the mendacity-restraining direction) to the action of latent interests, of any nature and in any number.

Suppose the point ascertained, that the individual in question (at present an extraneous witness) cannot be under the action of any sinister interest, unless the impulse has the suborning solicitations of the party for its source; in such case, if the party be re-

\* *Suprà*, Ch. 6.

garded as incapable of seeking to exert any such sinister influence, the probity of the party operates on that supposition as a security, and that an effectual one, against the improbity of the witness.

By this circumstance, in so far as it has place, the probability of mendacity is, it is evident, diminished: but what is equally evident is, that it is not altogether done away.

From past improbity, established by any manifest and notorious inquiry; from past improbity, though, to indicate the disposition, there be no more than a single act,—mankind are apt enough to predict, and infer with sufficient assurance, the manifestation of the like disposition on any individual occasion that presents itself. If on this head instruction be needful to the judge, it is not so much for the purpose of pointing out to him the inference, as for the purpose of putting him upon his guard against the propensity to allow it to take a stronger hold on the mind, than, upon an attentive consideration, it would be found entitled to possess.

Of the testimony of this or that person, on whose part improbity (in the shape of mendacity, or even in other shapes) is supposed to be notorious, it has been a common expression to say, It is entitled to no credit whatsoever,—or, No regard whatsoever ought to be paid to it. Applied to judicial testimony, the impropriety of any such proposition, will, on a more attentive consideration, be found (it should seem) undeniable. And this, not only because falsehood, known falsehood, is frequently a key as well as a guide to truth; but because, every

thing depending upon interest, a man of the most depraved character, of whom it could be ascertained that he was not under the action of any sinister interest, would with more safety be depended upon, than an average man deposing under the action of any interest, the magnitude of which could, reference being had to his situation, be pronounced considerable.

In a general point of view, and denoted by the concisest expression that can be found for it, the degree of probity habitually manifested in the disposition of a human being, will be *directly* (and that of improbity *inversely*) as the force habitually exercised upon it by the permanent tutelary interests and motives so often spoken of, in comparison of the force habitually exercised upon it by the seductive interests and motives.\*

As it is only through the medium of the habitual frame of mind, that any indication can be drawn from past acts, relative to the present frame of mind or disposition of the witness, and thence relative to the probability of a departure on the part of his testimony from the line of truth; it concerns the judge to look, in the first instance, to the habitual frame of mind, and in that view alone to have regard to any individual act.

One practical use of this caution, is, to preserve him from deducing too strong a persuasion from some single act, as established by some

\* Rules in detail for the estimation of the comparative degrees of probity and improbity in the moral part of the human frame, have been given at large in another work (Introduction to Morals and Legislation): they require too many preliminary observations to be inserted here.

conspicuous proof,—and not deducing a persuasion sufficiently strong from habit, *i. e.* repeated acts, as established or indicated by proofs or tokens less conspicuous.

By a judicial conviction, (of theft, for example), improbity on the part of the convict (*viz.* the degree of improbity necessary to the commission of such a crime) is established by proof of the most conspicuous kind. But, however conspicuous the proof, no stronger presumption is afforded of a frame of mind habitually disposed to the commission of that crime, than what is capable of being afforded by one single act.

On the other hand, suppose it established in the mind of the judge, to a degree of probability sufficient for this purpose, that to another witness, Furfur, it had twice happened to have been detected in a theft, to about the same amount as that of which the first thief, Fur, was convicted; but that, through the lenity of the party injured, or some other accident, conviction had in both instances been escaped. In the case of Furfur, it is evident, that, though evidenced by proof less conspicuous, the ground for suspicion is decidedly stronger than in the case of Fur.

From proofs of so conspicuous a nature, if exclusively attended to, the conclusion liable to be drawn would be more apt, perhaps, to afford fallacious lights, than true and useful ones.

Furfur is a depredator by profession: depredation, in one shape or other, has been his habitual source of subsistence: he has had no other. Fur has been convicted of a single act

of depredation once committed. Whatsoever indication of future testimonial mendacity may be to be collected from past delinquency in the line of depredation, is evidently many times as strong in the case of Furfur. But, in the judicial memorials of the respective prosecutions,—unless (what in England has never yet happened) the difference in this respect have been brought to view,—both documents, and assuredly that which exhibits the case of Furfur, will to the purpose have been incomplete, and thence liable to be fallacious.

Superior magnitude of the punishment in the one of two cases of depredation, as compared to the other, is another indication, which, by being conspicuous, is but the more liable to be fallacious. Proper or improper upon the whole, it is natural and frequent for depredation, in whatever shape, to be made punishable, upon a scale rising in some proportion with the value of the article which has been the subject-matter of the offence. With a view to one of the ends of punishment (*viz.* prevention), the difference has this obvious use, *viz.* its tendency to lead the delinquent to the desire of the less mischievous of two offences, in preference to the more mischievous. But, if in this case any such inference be drawn, as that, because the depredation to the greater amount is punished with the greater punishment, therefore, as between Fur Magnus who has been punished with the greater punishment, and Petty Fur who has been punished with the lesser punishment, the probability of testimonial mendacity on the occasion in hand is greater in the instance of Fur Magnus than in the instance of Petty Fur,

the conclusion would be more likely to be erroneous than just; for, the greater the sum stolen, the stronger the temptation: and because a man's probity has sunk under the stronger temptation, it follows not that it would have sunk under the weaker.

With regard to the probability of testimonial mendacity on the given occasion, (as indeed with regard to improbity in most other shapes,) indications much more conclusive may in many instances be drawn from factitious consequences foreign to the nature of the transgression, than from the nature of the transgression itself, even if known in all its circumstances. *Maculatus*, (at the time of his only offence, not a professional depredator), has, in virtue of his punishment, in the choice of which reformation was not so much as aimed at, been confined for years together in the company of a promiscuous and uninspected herd of professional depredators. *Furfur*, convicted of a theft to the like amount, has, during the same space of time, been confined in a state of constant occupation, either in solitude, or under an unremitted course of inspection in assorted company. Whatever be the indication, deducible from depredation, of the probability of improbity in a shape so different as that of testimonial mendacity; it seems evident, that, in the case of the ever solitary or constantly inspected convict, the strength of the indication can never be nearly equal to what it is in the case of the convict kept for the same length of time in a state of corruptive pupilage.

No anomaly of which moral conduct is sus-

ceptible, ought to be altogether strange to the conception of the judge. Presenting itself in a specific shape, temptation has been known to overpower the force of the improbity-restraining motives, in a mind on which, presenting itself in the general shape of money, (though to appearance in much greater force,) it would have made no impression. Those who, for any purpose, (for a negotiation of any kind, unlawful or lawful,) have to deal with gross and uncultivated minds, have frequent occasion to observe, that by money presented in the specific shape of liquor, a much greater effect may frequently be produced, than by the same quantity of money presented in its own genuine shape. In a higher sphere, many a man, whom a mass of uncounted money to a hundred times the value would have found temptation-proof, has felt his probity sink under the temptation presented in some specific shape peculiarly adapted to his taste and fancy: some choice and not readily obtainable production of art or nature,—a gem, a manuscript, a tulip-root, or a cockle-shell. Standing in a witness-box, a much more beautiful and choicer gem, parchment, root, or shell, would have been repulsed with horror, if presenting itself as the price of a deliberate departure from the line of truth. Yet, in a book presenting a general list of convicts, or even in the memorial made of the conviction of this particular individual, it might happen that the case and character of this man should remain undistinguishable from the case and character of the professional male-

factor, accustomed from infancy to behold in the habit of depredation the only source of his subsistence.

Whatsoever be the degree of improbity indicated by the past act or habit; with reference to the testimony in hand, the indication afforded by it of probable testimonial mendacity will naturally act with a particular degree of strength, where, on the past occasion, the shape in which it shewed itself was that same shape; viz. that of an act or habit of testimonial mendacity.

The reason is, that in this case it serves as an indication not merely of improbity, (a weak and vitious state of the *moral* part of the man's frame), but such a state of the *intellectual* part as hath disposed him to employ, and (according to his own conception at least) qualified him for employing, this particular sort of instrument (mendacity) for the compassing of his sinister and immoral ends.

To be able to frame a false story, capable not only of passing muster in the first instance, but, upon occasion, standing whatever scrutiny is in a way to be applied to it by means of counter-interrogation and counter-evidence,—requires a sort of intellectual firmness and vigour, the degree of which,—howsoever it may happen to be employed in the service of the sinister interests,—has no connexion with their comparative strength and influence. By setting fire to a crowded fleet of ships, or by drawing up a sluice, and so laying a whole town or province under water, a man may produce an abundantly greater quantity of mischief than has ever been produced by an act of testimonial

mendacity: but a man who on a former occasion has thus employed fire or water as an instrument of mischief, will not be so apt on a second occasion to employ a mendacious tongue for a purpose of the like nature, as one who, for the like purpose, has already made choice of the same living instrument.

Where, on the former occasion, testimonial mendacity was the shape in which the improbity manifested itself; indications respecting the probability of testimonial mendacity in the cause in hand may be deduced, from the consideration, to which of the several modifications of which testimonial mendacity is-susceptible, the mendacity belonged in that instance.

These modifications, in so far as they belong to the present purpose, will turn upon the degree of improbity manifested by the mendacity in the former instance; and thence either upon the strength or weakness of the influence of the standing tutelary sanctions, the improbity-and-mendacity-restraining interests, or upon the strength of the temptation which that influence had to contend with, and by which it was overcome.

The distinctions of which testimony is susceptible, considered with reference to the person whose interest is affected by it, and the manner in which it is affected, have been already brought to view. Veracious or mendacious, those distinctions are alike applicable to it; testimony self-regarding or extra-regarding: in both cases, servitive or disservitive: if disservitive, criminative or simply onerative: if servitive, exculpativè, exonerative, or locupletative.

Here follow certain indications afforded concerning the probability of testimonial mendacity in the case in hand, from the consideration of the nature of the mendacity in the former instance.

1. Where, in the former instance, the object of the mendacity was to save another person from punishment, no evil being thereby done to any other individual, or none more than equal to the good done to the party favoured by it; the probability of mendacity in the case in hand, as deducible from such former mendacity, seems scarcely to be so great, as where, in the first instance, the man's object had been to save himself from punishment to the same amount.

The reason is, that in the one case a proof is given of an extraordinary degree of force on the part of the principle of humanity, the interest of sympathy: which proof is not given in the other case.

But this indication is not afforded, except on the supposition of the entire absence of every interest of the self-regarding kind: a matter of fact which will not often have place, nor, when it has place, be very easily ascertained.

2. Where, in the former instance, the object of the mendacity was to save a man's self from evil of any kind, whether under the name of pure punishment, or satisfaction to another for injury; the greater the evil, the less the probability it affords of mendacity in the case in hand: or, conversely, the less the evil, the greater the probability of mendacity in the case in hand.

The reason is, that, because a mendacity-

promoting interest of a given magnitude had the effect of overpowering the mendacity-restraining force of the tutelary sanctions, it follows not that a mendacity-promoting interest of less magnitude would have been productive of the same effect.

Every one sees, that though, to save his life, or to save himself from a pecuniary punishment, or from a pecuniary obligation on the score of satisfaction, to the amount of 500*l.* (being the whole amount of his property), he fell into this transgression; it follows not that he would have fallen into the same transgression, to save himself from the obligation of paying 5*l.*, being but one hundredth part of the whole amount of his property.

3. Where, in the former instance, the object of the mendacity was to save another person from merited punishment; the probability of mendacity in the case in hand, as deduced from such former mendacity, seems not so great as where, in the former instance, the object was to consign another person to unmerited punishment.

The reason is, that in the one case indication is given of the prevalence of the interest of sympathy, or principle of humanity, (one of the standing tutelary sanctions), to an extraordinary degree: whereas, in the other case, an indication is given of an extraordinary degree of insensibility to the force of that sanction, as well as of most, or all, of the other tutelary sanctions.

4. Where, in the former case, the object of the mendacity was to obtain, for a man's self, an undue gain; the probability of mendacity,

in the case in hand, as deduced from such former mendacity, seems still greater than where in the former case the object was merely to subject another person to unmerited punishment.

The reason is, that the interest of ill-will (the seductive interest by which the mendacity was produced in the one case), especially where the correspondent passion has risen to so high a pitch in respect of duration as well as intensity, has but a casual existence, and cannot be produced but by some comparatively rare occurrence or state of things: a man's probity may, therefore, on a particular occasion, be overpowered by it, and yet (far from being seduced) it may never happen to him to be so much as solicited, by the same sinister interest, to give into the like evil course at any other period of his life. Whereas, pecuniary interest, not requiring any such special incident, or special object, for the creation of it, is created and kept alive at all times by the matter of wealth in all its shapes: and is, therefore, (particular purposes being alike laid out of both cases, and the sum constitutive of the interest being supposed to be the same in both cases), as likely to have place and be prevalent in the one case as in the other.

N. B. In this case, much (it is evident) will depend upon the circumstances of the case in hand. For if, in the case in hand, all self-regarding as well as social interest on the part of the testifier is clearly out of the question, (as may be the case, for example, where the testifier is prosecutor, and the only effect

capable of resulting from conviction is punishment), the prevalence of ill-will in the former case may afford a stronger indication, a greater probability, of the prevalence of the like passion in the case in hand, than would even have been afforded by the prevalence of pecuniary interest in the former case. But in the case of pecuniary interest so much depends upon the sum, and its proportion to a man's habitual expense and present exigencies, that every comparison which has this interest for one of its terms, is liable, as every one must perceive, to great uncertainties.

5. Where, in the former case, the object of the mendacity was to save or obtain a gain; the probability of mendacity in the case in hand, as deduced from such former mendacity, seems to be greater than if, in the former case, the testifier's object had been to save himself from a loss to the same amount.

The reason is, as already observed,\* that the influence of a given sum on the well-being of the individual, when considered as passing out of his hands in the shape of loss, is greater than that of the same sum when coming into his hands in the shape of gain: and therefore, that the force of the interest is, in the same proportion, greater in the one case than in the other: and it follows not that, because the force of the mendacity-restraining interests has been overcome by a given force, therefore it will by any less force.

But as to the point whether, with reference

\* *Suprà*, Ch. 3.

to a given individual, the sum in question, if coming into his hands, is to be considered as passing into them in the shape of gain, and so gained, or only as passing into them in the shape of security against loss, and so simply not lost; or, on the other hand, if going out of his hands, is to be considered as going out in the shape of loss, or as simply not staying in, in the shape of gain; this point, though in many instances clear and out of doubt, will in many instances be subject to doubt, and to doubts absolutely insoluble. The matter depends upon the strength of his persuasion; and this, too, taken at a point of time not always easy to be settled. If, at any given point of time, with an equal degree of persuasion, two contending parties expect, each of them, concerning the same sum, either that it shall not go out of his hands, or that it shall come into his hands; the not coming in, in the one case, and the going out in the other, may, in the instance of either of them, be alike productive of the sensation of loss.

On the part of a person in whose breast the existence of improbity in a very high degree is notorious, either from proof made on a past occasion, or from the light in which he appears in the cause in hand; there are several circumstances, each of which may, in aid of the standing mendacity-restraining sanctions, contribute to lessen the probability of mendacious testimony in that case. These are:

1. Extraordinary difficulty, real, and thence apparent, of carrying through, (in the particular circumstances of the cause in hand, and of the part taken by him in that cause), of carrying

through a scheme of mendacity with safety and success.\*

2. (In a case in which an effect of the mendacity, if successful, will be the bringing down upon the head of any particular individual—naturally the defendant—a burthen of affliction particularly severe, such, for instance, as unmerited capital punishment)—the extraordinary severity and afflictiveness of such burthen.

To the joint influence of these causes, on minds on which the influence of the three other tutelary sanctions (the political, the moral, and the religious), especially the two latter, cannot but have been at its lowest pitch, may (it should seem) be ascribed, in great measure at least, the comparative unfrequency of criminative perjury; and the innoxiousness (as far as can be judged) and utility of the judicial practice by which, under the highest temptation that can be offered, the testimony of known malefactors of the most profligate description is every day admitted as the principal, and sometimes even as the sole, ground for convicting men of the highest crimes, and thence subjecting them to the most rigorous punishment afforded by the law.

That the social principle of sympathy bears some part in the production of the effect, there seems no reason to doubt. But that the part it bears, is, in comparison of that of the other (the self-regarding principle), much the least

\* This difficulty,—in so far as concerns mere pain of exertion, mental labour, distinct from sense of danger,—coincides with that principle of action which, under the name of the *physical* sanction, constitutes the first article in the list of standing tutelary, and thence mendacity-restraining, sanctions.

considerable, is rendered but too manifest by very conclusive indications. In some countries, standing funds of reward have been established by law, for the purpose of engaging men to pursue to conviction offences of this or that particularly obnoxious description; such as depredation, in the various shapes in which,—though the mischief of the first order (the loss actually produced) is confined to assignable individuals,—by far the greater part of the mischief, viz. the danger and alarm, diffuses itself over an indefinite space in the circle of the community at large. Influenced by these rewards, instances have been known, in which men have formed themselves into confederacies for the purpose of reaping the rewards in question at the expense of the ruin of a set of victims, to whom, in one sense, the word *innocent* would not be misapplied.

To entitle themselves to the receipt of the reward, to the payment of which conviction was the previous condition, it was necessary that evidence of the offence, evidence constituting a sufficient ground for the conviction, should have been delivered. To give birth to this evidence, what did they? They gave birth to the offence itself: an offence, an individual offence, of the description itself, was to be produced, that a body of evidence, effectual to the purpose, might be sure to be delivered. On such occasion, an innocent man, a man till then innocent, was to be seduced into the commission of the offence. The offence being really committed by him, care was at the same time taken, that the circumstances in which it was

committed, should be such as to leave no deficiency in the necessary mass of evidence.\*

\* In the year 1754,—confederacies for the purpose of availing themselves of this encouragement having been systematically organized,—mischief (effects at least, good or bad) in a quantity considerable enough to engage no small share of the public attention, had, among the lower orders, been done by them. Several persons had been convicted, one at least had suffered death, for acts of robbery, into which, it came out, that they had been seduced by the confederates. Four men, Mac Daniel, Berry, Egan, and Sullivan, after having been (in consequence of a special verdict) acquitted on an indictment charging them as accessaries to the robbery, were tried and convicted on an indictment, in which, for the designation of the offence, the unmeaning appellation of *conspiracy* was employed.† One of them, Egan, being, in pursuance of his sentence, put into the pillory, was murdered by the populace upon the spot. Another, Berry, died of his wounds. Whether any real mischief, other than the alarm, was done by this confederacy, seems, after all, a matter of doubt. In the only case the particulars of which are known, the two victims, though engaged by a sort of treachery in the commission of the individual offence of which in consequence they were convicted, had, in pursuance of their own schemes, been habitual depredators, though, for any thing that appears, in a line somewhat inferior in criminality; viz. simple theft, instead of robbery accompanied with force. This being the supposed case, the effect of the terror inspired by such practice would be purely salutary rather than otherwise, tending to the destruction of confidence among malefactors, and thereby to the destruction of that small and destructive portion of society, whose destruction is the preservation of the innocent part. The malefactors were, two of them, murdered in the pillory. The murderers, if not thieves themselves, were probably set on by those who were.

Correct or incorrect, the following more recent story,

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† State Trials, x. 418—447. Foster's Reports, p. 121—130.

To what cause is this characteristic part of the contrivance to be referred? Not, in any respect, to sympathy: for the suffering to which the victim was consigned, after having been thus drawn into guilt, was not inferior to the suffering to which he would have been consigned, had he been left in possession of his innocence.

There remained, therefore, this one cause: viz. a view of the advantage which, in respect of its comparative chance of obtaining credence, under the security afforded against deception

copied from the newspapers, will be equally subservient to the purpose of illustration.

"A curious stratagem in the trade of *thief-catching* was played off on Tuesday, at broad noon, in the sequestered walk which leads from the end of the canal at the top of the Green Park, through the shrubbery, to the gate at Hyde Park Corner. A fellow, who had the appearance of a farmer's or cow-keeper's servant, with a milk-vessel in his hand, and a watch in his fob, stretched himself on his back upon the grass at the rear of the Ranger's Lodge, as if drunk and asleep; while two of his companions took their stations at some distance. A sweep, with his boy, passing shortly afterward, the former fell completely into the trap, by embracing what he, no doubt, conceived to be the fortunate opportunity of helping himself to the sleeper's watch; who suffered him, without interruption, to bear off his prize for a dozen yards, and then, jumping up, raised the *hue and cry* of stop thief! which was instantly repeated by his companion, and the sweep seized, with the watch in his possession. They insisted on taking him immediately to Bow Street, and prosecuting him for the robbery; but a reputable and resolute gentleman, who lives at Knightsbridge, and who saw the whole transaction, interfered, and told the captors, that if they took the prisoner before a magistrate, to prosecute him capitally for the offence into which they had entrapped him, he should certainly accompany them, and give evidence of their conspiracy: upon which they very quietly surrendered their prisoner, and marched off."—*Times*, 1 August, 1806.

by the faculty of *vivâ voce* cross-examination, a true story is so sure to possess over a false one. For, by the delivery of a true story, no other faculty is called into exercise but the *memory*; a faculty in respect of which, to any such purpose as that here in question, no deficiency can exist in the mind of any man. For the delivery of a false story adequate to the production of the same effect, the exercise, and the successful exercise, of two other faculties, each of which must be possessed in an extraordinary degree of perfection, viz. invention and judgment, is indispensable.

The grand instrument, the touchstone by which falsehood is detected, is inconsistency. In the delivery of a true and correct narrative, inconsistencies are impossible; for, of any two, or any number of real facts, to say that any one can be inconsistent with any other, is a contradiction in terms. Falsehoods, to escape detection, must to appearance be equally clear of inconsistency: of inconsistency, as well with respect to each other, as with respect to all known and indisputable truths. But to invent a number, though it was but a small number, of falsehoods, which shall not only at the moment but on all future occasions stand clear of every such inconsistency, is in general, (especially under the check of cross-examination), a task of extreme difficulty: and, by the force of that check, the number of such facts which a man shall be called upon to invent, to invent at the moment, on pain of seeing the expected fruit of his labours gone, and punishment ready to fall upon his head instead of it, is without limit: and in the exercise thus given to it, the

faculty of invention must at every step be accompanied and supported by the faculty of judgment, and that at a pitch of perfection, such as the strongest mind can never feel itself assured of rising to.

Where, as in the sort of case in question, the perceptions obtained were at the time associated with such an idea of their importance as was sufficient to command a force of attention sufficient to fix them in the memory,—and the first depth of the impression has not been defaced in any considerable degree by the hand of time,—the images presented by the memory are at all times the same: no danger of inconsistency between the account given of a fact at one time, and the account given of the same fact at another time. But the images of which the picture given of a false fact is composed,—these images, having no real standard by which they can be adjusted, no real archetype by which they can be fixed, will be at every moment liable to be changed: and as often as a change (though it be in any the minutest particular) takes place, so often is an imminent danger of inconsistency, and thence of detection, produced along with it.

Let it not here be forgotten, that for these always dangerous, though perhaps necessary, remuneratory arrangements, the demand is produced, in no inconsiderable degree, by the exclusionary system; viz. by that branch of it, which, on the score of vexation (if for any reason at all), forbids the application of judicial questions to any such purpose as that of extracting evidence of guilt from the lips of malefactors. And moreover, that among the effects

of it is that of making it men's interest to nurse less mischievous malefactors, capable of yielding but small rewards, till they have ripened into malefactors of a more mischievous description, yielding larger rewards. By this means, while mischief is weeded out with one hand, it is sown with another. But this part of the mischief seems referable rather to the gradation established between the quantum of reward in one case and that in another, than to the application of remuneratory arrangements in aid of penal ones.

## CHAPTER VIII.

OF THE COMPARATIVE MISCHIEF IN THE EVENT  
OF MISDECISION, TO THE PREJUDICE OF THE  
PLAINTIFF'S, OR OF THE DEFENDANT'S SIDE.

THE above-mentioned particulars, such of them as the nature of each case has happened to present, having been taken into consideration, and the trustworthiness of the witness or witnesses on one or both sides remaining in doubt, and with it the decision proper to be grounded upon the evidence; a consideration to which it may be of use that the mind of the judge should not be wholly inattentive, is the difference (if any) in point of mischief, that may be incident to the decision; viz. according as it happens to have for its sole or principal ground the testimony of an extraneous witness, or that of a party, and, of the parties, that of a defendant or that of a plaintiff. For if, as between right decision and misdecision, the scales of probability appear to hang upon a level, his choice will naturally fall on that side on which, if to the prejudice of that side misdecision should ensue, the quantity of the mischief resulting from it will be at the lowest pitch.

I. Mischief of plaintiff's mendacious self-

serving testimony, compared with that of defendant's *ditto*.

1. In general, in a case where money is at stake, the quantum of mischief liable to result from an erroneous decision pronounced in favour of the plaintiff's side, and grounded on the mendacious testimony of the plaintiff, is greater than what is apt to result from an erroneous decision pronounced in a case where the same quantity of money is at stake upon the ground of the mendacious testimony of the defendant.

The reason is, that in the station of plaintiff it rests with every man to multiply suits at pleasure; to harrass with suits any persons and any number of persons at pleasure. If, then, by his own testimony alone, he has obtained a judgment against this or that one person, that testimony being generally understood to be mendacious,—in such case, this one groundless demand having succeeded with him, there is a danger lest he should extend his enterprizes to another, and then to another, and so on without limit.\*

This might be the case, for example, if, in the character of an informer, a man were to take upon himself to raise money by his own mendacious testimony: instituting, or causing

\* In this case, however, the mischief produced in the shape of danger and alarm to the community at large, will be apt to be less where the demand had for its ground a claim of indemnification, (viz. on the score of a loss already incurred, and known to be so,) than where such previous loss is out of the question.

The reason is, that, in the case of indemnification, the aggregate quantum of possible demands, true and false, is limited by the aggregate quantum of actual losses.

to be instituted, against a person altogether innocent, a charge of having committed some offence, to which a pecuniary penalty, payable in the whole or in part to the informer or witness, stands annexed; and supporting the charge by his own testimony: that testimony (the defendant being innocent) of course mendacious.

But though, on the supposition that any such practice as that of making a trade of giving groundless informations supported by false testimony were habitual, the danger indicated and the alarm produced by a given sum raised in this way by a given number of suits, would be greater than the danger indicated and the alarm produced by the same sum raised by evidence equally false in the same number of suits of all other kinds taken together; yet it follows not that, in any given suit taken by itself, (and independently of any such habitual practice, the existence of which is supposed, for mere illustration, to have been ascertained), mendacity in this case is at all more probable, than, under the action of a pecuniary interest of equal value, it would be in any other sort of suit, whether on the plaintiff's or on the defendant's side.

An informer is one who, at the invitation of the law, lends his hand to the administration of justice. It follows not, that, because a man is ready for a certain price to give true evidence, he is ready to give false evidence for the same price: it follows not, any more than that, because a man is ready, in the capacity of a judge, for a certain salary, to engage to administer

justice, and do his part towards the due execution of the laws, he is ready, for the same salary, to engage to practise depredation under the name of justice. It follows not, any more than that because for a given price a man is ready to engage to contribute to the defence of his country against the invasion of a foreign enemy, therefore for the same price he is ready to engage to contribute to the destruction of his country in the service of the enemy. It follows not, that, because by swearing truly he expects to gain 10/., therefore he will depose falsely for that purpose; nor that, because, at the expense of the same sum expended in costs of prosecution, he seeks the pleasure of revenge at the expense of any person who, no matter on what account, has become the object of his ill will,—therefore, to gain the end of the prosecution, he will, in the character of witness for the prosecutor, deliver mendacious criminative evidence.

In various ages and countries, mischief in vast quantity has been operated by men in the character of informers. But the testimony by which in these instances it has been operated, the testimony which has served as the instrument of the mischief, has been, not mendacious, but veracious testimony; the fault has lain, not in the informers, but in the laws.

England, in the time of Henry VII., afforded a remarkable example, probably the most remarkable that is to be found in the history of any age or nation, of mischief flowing in prodigious masses from this source. But, in so far as it was the cause of terror, and a fit object

of blame, the mischief was the sole work of the legislator. Laws were sown, that forfeitures might be reaped.

II. Mischief of party's mendacious testimony, compared with that of extraneous witness's *ditto*.

In general, the quantity of mischief apt to result from misdecision in favour of either side, when grounded on mendacious testimony on the part of an extraneous witness, is not so great as when grounded on the mendacious testimony of either party, testifying in his own favour.

The reason is, that it depends not on an extraneous witness to originate the suit, in the course of which his testimony is delivered: it lies not therefore in his power, as in that of a plaintiff, to multiply suits at pleasure, and (if gain were to be made by unjust demands, supported by mendacious testimony) to multiply at pleasure occasions of employing testimony as an instrument of legal depredation.

To originate causes of suit,—and thence in a remote way (though not to a certainty) to originate suits themselves,—is competent to any man: and thence to a man, who, when the suit takes place, occupies the station of defendant. To originate a suit immediately, and without needing the concurrence or antecedent agency of any other individual, belongs also to any individual: which individual, as soon as the suit is instituted, assumes thereby the character, and occupies the station, of plaintiff. But to originate any sort of suit, either remotely, as in the character of future contingent defendant, or immediately, as in the character of actual plaintiff, is the exclusive character of

a party, and is incompatible with the station of extraneous witness.

III. Mischief of party's self-disserving, compared with that of his self-serving, mendacious testimony.

In the case where it happens to a man's testimony to be mendacious to his own prejudice, and not to the prejudice of any one else; in such case, if a decision conformable to it be grounded on it, which decision thereby comes under the description of misdecision, the mischief of such misdecision does not stand upon so high a footing as that of a misdecision to the same effect produced by any of the ordinary causes.

The reason is, that the mischief of the second order, the danger and alarm,\* in comparison of which the mischief of the first order is much inferior in importance, amounts to nothing in this case. A man, as often as, without being guilty, he chooses to confess himself guilty, will suffer accordingly: let this be understood. But what, in this case, is the amount of the danger? for how few are there who will be disposed to make any such choice? and if there were ever so many more, where is the great harm done? *Nemo audiatur perire volens*, says the maxim of Roman-Gallic law. But on the other hand comes the maxim, *volenti non fit injuria*: why refuse to hear him whose wish it is to "perish," if, in the judgment of the person most competent, he will not be injured by it? So again as to the alarm. For, by the supposition, the

\* See Introd. to Morals and Legislation, and Dumont, *Traité de Législation*.

choice is the man's own: if force be employed, the case quadrates not with the present case; and who is there in whose breast any pain of apprehension can be infused, by the idea of an evil to which he cannot be exposed but by his own free choice?

But though, in this extraordinary sort of case, the mischief of misdecision is not so great as in ordinary cases, still neither is the case altogether free from mischief. For, by the manifest opposition of the case to the ordinary course of human conduct,—men at large, observing a man convicted on his own self-criminative testimony, on his own confessorial evidence, which afterwards is by accident discovered or suspected not to have been true, will be led to suppose or suspect it to be the result of secret subornation: subornation acting possibly by holding out hope of reward, more naturally by holding out fear of undue punishment, or of injury in some other shape.

Hence one reason, why confession in general terms should never be received, to the exclusion of complete as well as correct testimony from the same source: to the end that, in case of incorrectness or incompleteness, intentional or not intentional, such self-regarding and self-criminative testimony may, from the approved sources, counter-evidence and counter-interrogation (performed at any rate by the judge), take its chance of being rendered correct and complete: as if, instead of being self-regarding, it had been so much extraneous testimony.

## CHAPTER IX.

ULTERIOR SAFEGUARDS AGAINST THE INCONVENIENCIES WHICH MAY PRESENT THEMSELVES AS LIABLE TO ARISE FROM THE ABOLITION OF THE EXCLUSIONARY RULES.

PANIC terrors, genuine and counterfeit, are among the life-guards of abuse. From reform, be it what it may, fears are professed by sharp-sighted hypocrites, fears are felt and entertained by their weak-sighted dupes. Knavery presents the phantasmagoric magnifying glass; and it is through this medium that danger is viewed by the eye of imbecility.

Any thing which, in the case of the reforms here proposed, may contribute to allay the accompanying apprehension, is deserving of notice.

The safeguards here in view may be ranked in the first place under two heads: 1. Safeguards against deception and consequent misdecision: 2. Safeguards against vexation, in so far as unnecessary and unprofitable.

Under either head may again be distinguished: 1. Such as exist or would take place of themselves, but may notwithstanding be pointed out to good purpose, as being liable to be overlooked: 2. Such as, though not at

present in existence, nor of a nature to take place of themselves, might (as it seems) be established to good purpose, and may therefore be considered as eventually waiting to be established.

Under the head of existing safeguards, the following may be worth noticing.

One ground of alarm may be, the danger of mendacity, and consequent deception and misdecision, from the giving an unlimited admission to the testimony of the plaintiff.

By way of antispasmodic against the terrors from this source, it may be proper on this occasion to bring to mind once more the testimony of experience, certifying that, in so many cases, where, by the reason of the most cogent interests, the mendacity-promoting force has been at its highest pitch, no symptoms of mischief from this source have ever been discernible : habitual and professional depredators, delivering their testimony against accomplices, under the temptation offered by impunity instead of capital punishment, with the addition of pecuniary rewards to an amount far beyond what are usually offered to individuals at large. These are rewards earnible by truth as well as by falsehood. But rewards, equally offered, and not earnible but by mendacity, are the rewards by which servants in trade, who have goods to deliver from traders, their masters, to customers, are invited to steal the goods, and then by their testimony charge the customer with the receipt of them ; the customer, whose true testimony cannot be opposed to their mendacious evidence.

*Lawyer.* The defendant will stand exposed

to whatever danger is attached to the admission of the testimony of the plaintiff.

*Non-lawyer.* Good: but while, from the admission given to him, the plaintiff derives the faculty of delivering false testimony to the prejudice of the defendant,—so, by the admission given to the testimony of the defendant, does the defendant derive the faculty of defending himself, for which, by the supposition, the simple truth is sufficient. Truth opposing herself to the plaintiff, truth giving her support to the defendant,—plaintiff and defendant being in other respects on equal terms,—in favour of which side lie the odds?

*Lawyer.* But a case that in reality will frequently happen, is, that the matter of fact, notwithstanding the consequences of it with relation to the interests of the defendant, has not fallen under his cognizance. If, the defendant having been wounded, it be by your hand that the wound has been inflicted, it can scarcely happen but that the fact must have fallen within your knowledge. But if it has been by the teeth of a dog of yours, or by the horns of a bull of yours, this may as well have happened, you being at a hundred miles distance, as in your presence. The plaintiff being predisposed to lie, and having his choice of lies, his care will be, that in the scene he feigns, you, the defendant, shall not be one of the actors.

*Non-lawyer.* Doubtless this will be his best policy; just as, under your own established and therefore faultless system, were the tradesman's servant to steal the goods, and then swear he had

delivered them to the customer, it would be better policy to suppose them delivered at his house out of his presence, than in his presence ; although the testimony of the customer, to whose loss the theft and the perjury are committed, would not be admitted to contest it.

But, the door being, by the supposition, as completely open to the testimony of the defendant as to that of the plaintiff, and the fact on which the plaintiff grounds his claim being by the supposition a fact altogether false ; the case will be, that the defendant, if he contests the claim, believes the fact to be false. Under whatever sanction, therefore, (call it oath, call it what else you will) the plaintiff affirms, contrary to truth, his persuasion of the existence of the fact, the defendant will of course affirm his persuasion of the non-existence of it. Here, then, it must be confessed, we have a danger of deception, as we have in all cases in which testimony is admitted. But the plaintiff's story, being by the supposition an utter falsehood, has every thing to fear from scrutiny, from counter-interrogation, from whatever counter-evidence can be afforded by circumstances ; while the assertion of the defendant, being true, can find nothing to oppose it from either of these sources.

Now observe how the matter stands under your system. Innumerable are the instances in which the fact constitutive of a right on the part of Titius, being true, would be testified and put beyond doubt by the testimony of Titius, if, Titius being plaintiff, his testimony were admitted. In perhaps the greater num-

ber of these instances, the fact being as well known to the defendant as to the plaintiff, and the defendant not being disposed to be at the expense of perjury to save paying what in justice he ought to pay, he would do one of two things: if the fact had fallen within his cognizance, he would confess it; if the fact had not fallen under his cognizance, yet, hearing it sworn to by the plaintiff, and not looking upon the plaintiff as a man who would perjure himself, he would not, upon his oath, declare his disbelief of the statement sworn to on the other side.

Now what does your system in this case? To the evil-doer it ensures success and triumph, without peril of perjury, or expense of litigation: to the innocent and injured, it ensures loss, without hope of safety,—injury, without the possibility of self-defence.

*Lawyer.* Well, and what then? He should have been wiser. It should have been his care to have provided himself with legal evidence.

*Non-lawyer.* His care! Yes: but can it be a secret to you, that in many cases such provision would be impossible? that in others the precaution would be resented as an insult, and the transaction itself (the contract, or whatever it be) out of which the right arises, be by that means rendered impossible? And suppose him (like Duke and no Duke) never to travel without a train of witnesses at his heels: have you any secret you could supply him with, to enable him to keep them alive at pleasure?

He should have provided himself with legal evidence! Do you and yours, from the lowest to the highest of you, know what legal evidence

is? Would you let him know, if you did? Did you ever, with your own good will, do any thing towards letting men know what (on this subject or on any other) the law, the law which you every day compose on pretence of declaring it, is? Have you ever ceased to do whatever was in your power to prevent all such knowledge from being attainable — to keep all such knowledge out of their reach?

The system which the suitor supposes to be established, the system on the confidence of which he acts, is the system declared to him by domestic experience, right reason, and common sense. This system he sees pursued, even by you and yours, in some cases: deceived by your indefatigable self-eulogiums, he concludes it to be pursued in all cases. Your exceptions, extensive and numerous as they are, how should he divine them? To give himself the least chance for it, it would be necessary for him, at the outset, to begin with discarding his ordinary guides, common honesty and common sense.

Here may be the place to observe once more, that the utmost danger which can be apprehended from the freest admission of self-serving testimony on both sides, is inferior, far inferior, to that which, under the technical system, has place in every day's practice. In all cases, from the most lightly to the most heavily penal (personal injuries, acts of depredation, acts of malicious destruction), where an injury by which an individual is the immediate sufferer is treated on the footing of a crime,—the testimony of the party injured (testifying under the influence of an interest in the strictest

sense pecuniary, viz. that constituted by *costs*,—and always under the smart of the injury, be it what it may), is admitted under the name of evidence: and under the sort of sanction reserved for those declarations which are received under the name and on the footing of evidence,—the sanction of an *oath*, fortified by the eventual punishment attached to the breach of it: while, on the other side (the defendant's), though, under the name of the defence, the party, if present, (which in slightly penal causes it is not necessary that he should be), cannot be prevented from saying what he thinks fit,—yet, what he does say, not being corroborated by the sanction of an oath, nor being subjectable to counter-interrogation, is not received under the name nor on the footing of *evidence*.

What is to the present purpose, is this question:—If no mischief is experienced from the *partial* admission of self-serving testimony, the admission of it on the plaintiff's side, on that side on which (as hath been seen) it is most dangerous;—can any greater danger be reasonably apprehended from the *impartial* admission of it, from the unreserved admission of it on both sides?

The above observations on the safeguards which already exist, may suffice to dispel all vague fears that great prejudice to justice would result from the abolition of the exclusionary rule.

An ulterior safeguard, which is not, but which might be, and ought to be established, is the registration of evidence.

By the registration of evidence, I do not

mean the committing of the evidence to writing *in terminis*; but merely the making a memorandum of the species and nature of the evidence, under apposite heads.

The immediate use is, to shew, on the occasion, the strength of each article of evidence: to indicate the strength of it, as far as the denomination to which it belongs, and under which it is entered, may be conducive to that purpose.

The ulterior use is, to put a mark of distinction upon every cause in which, on the side in favour of which the decision was pronounced, the mass of evidence was, in point of strength, in any respect below the ordinary standard.

The ultimate use is, to indicate, not indeed the exact quantity of the mischief, (for when there is none, none can be indicated), but the *maximum* of the mischief which, in the way of misdecision, under any head of infirmity or suspicion, can have owed its birth to the abolition of the exclusionary rule. 1. Judgment for the plaintiff. Evidence for the plaintiff, none but the plaintiff's testimony. Evidence for the defendant, none but the defendant's testimony. 2. Judgment for the defendant: state of the evidence the same. 3. Judgment again for the plaintiff. Evidence of the plaintiff delivered by him, or not delivered: the fact (the collative, or say investitive, fact, by which the right in question was conferred on him) not having fallen within his cognizance, nor any other fact serving for proof of it in the way of circumstantial evidence. Extraneous witness, Matthew Martyr: his testimony exposed to suspicion by interest derived from rela-

tionship, he being husband, son, father, brother, partner, servant, master to the plaintiff; or by specific pecuniary interest, in such or such a way; or by improbity, as evidenced by his having been convicted of such or such an offence.

Ulterior details might, in this place, be regarded as superfluous and premature: what is above will serve for an indication of the ends to which the proposed arrangement is directed. To frame an apposite system of book-keeping, whereby, for each cause, the labour of registration could be reduced within the compass of a few words, would be a consequential task, and not a difficult one.

I speak of the system of registration as exhibiting the *maximum* of mischief from deception and consequent misdecision having infirmity of evidence for its cause. I say *the maximum*; it being understood that, supposing in every cause the decision given in favour of that side of the cause on which the evidence was thus defective to have been erroneous, the greatest number of causes in which this error, error from this source, *could* have taken place, is thus brought to view. But so it may be, that in no one of all those instances *was* the decision erroneous: still, in this case, the word *maximum* is not less apposite than if the decision was erroneous in all those instances.

On the present occasion, in speaking of infirm and suspectable evidence, those causes alone of inferiority need be thought of, that have been brought directly to view in the course and for the purpose of the present work. In a system of registration, in so far as adapted

to the end here in question, the several other causes of infirmity would be equally entitled to a place. The heads being expressed by apposite denominations; the operation of making, on the occasion of such cause, the several entries under those several heads, would present little difficulty. Mercantile book-keeping, an art which, under the existing system of nomenclature, is clouded and perplexed by obscure and unexplained fictions, presents much more.\*

\* Thus much being said of one part of the proposed system of judicial book-keeping, a word or two for the purpose of sketching out a general idea of the remainder, may perhaps not appear misemployed. Suggested by a collective view of all the ends of justice, the system, taken in both its parts, embraces in its design all these several ends.

Of the part here more particularly in question, the object is to prevent misdecision: it accordingly presents continually to the view of the legislator the several quarters in which the seeds of misdecision seem to be most apt to lurk.

Of the remaining part, the object is to prevent needless and avoidable delay, vexation, and expense. Taking, therefore, for the standard quantity of that mass of collateral inconvenience, the quantity which experience has shewn to be sufficient in a vast majority of the whole number of causes of all sorts; it calls upon the judge, in each instance in which that standard quantity has been exceeded, to point out, by apposite entries under apposite heads, in his view of the matter, the cause by which such excess has been necessitated, or at any rate produced.

Of the established system of mercantile book-keeping, the object in view is to enable the individual whose transactions it is employed to record, to ascertain at any time the balance as between the amount of assets and debts due, with the amount of profit or loss from each source; for the purpose of raising to its maximum the aggregate of the one, and reducing to its minimum the aggregate of the other: not to speak of other subordinate objects foreign to the present purpose.

Of a rational and honest system of judicial book-keeping,

*Lawyer.* What! more records? and have we not records enough already? and is there not enough in them? and is there to be nothing

(not to speak here of the uses to individuals in the character of suitors, or of the uses to the judge), the uses to the legislator would be, to enable him to reduce to its minimum the aggregate amount of misdecision and failure of justice on the one hand, of judicial delay, expense, and vexation, on the other: and this by indicating in each instance (in so far as it is susceptible of indication) the maximum, and, if possible, the actual amount, of each individual mischief produced on each occasion; with the cause, so far as it may be discernible.

Of the actually existing system of judicial registration and non-registration (for omissions have their effect, and their use), as established by and under the technical and fee-gathering system, what true account can a man find to give? That the effect of it has been, most certainly, and the design of it almost as certainly, to enable the masters and journeymen of the justice-shop to cheat and deceive their customers.

Of the natural and inevitable causes of complication (which is as much as to say, of an extra degree of expense, vexation, and delay), a collective, and it is supposed pretty complete, view, is given in a table annexed to another work (*Scotch Reform*): and along with them, for illustration, under each cause, a set of examples, exhibiting the suits of different descriptions in which it is most apt to have place. A certain portion of time (and that happily a very short time) pointed out by experience, is taken for the standard: these are called *simple* causes. To this standard all other causes are referred: they are called *complex* causes. Taking any given individual cause; if the length of time it occupies extend considerably beyond that standard length, if it be of such a length as to require adjournment, the demand for the extra length must have for its cause some one or more of the causes enumerated in the table. These causes being all foreknown, and previously understood and ranged in the form of a table; the judge, as his warrant for the adjournment he puts upon it, makes a memorandum of the existence of such cause or causes: each party at the same time being called upon to annex to such indication a memorandum of the assent to, or dissent from, the matter of fact asserted by it.

said about John Doe and Richard Roe? and do you mean to confound the distinction between courts of record and courts not of record?

*Non-lawyer.* To make answer to your questions, the matter of your records may be divided into three portions. 1. Sheer lies. 2. Impertinent and useless truths. 3. Instructive truths. The instructive truths, that is, heads for the reception of these, it is our wish to preserve: though it would require a microscopic eye to spy them out: and if they were of iron, so much the better, because in that case a magnet would save time and scrutiny.

Of the sheer lies and impertinent truths, I agree with you that there is enough already: and therefore it is, we propose that no further additions shall be made to that part of the stock. If your relish for the dish remains after the *odor lucri* has evaporated, you know where there is enough for it.

Courts of record, courts not of record! A precious distinction, truly! A precious end it aims at—and a precious use has been made of it! Know you then of that judge, whose operations will be likely to be better secured against error (designed and undesigned), against needless delay, expense, and vexation, by the assurance that they will be buried in oblivion? Can there be so much as a pretence for omitting to perpetuate the memory of every thing that passes (except the verbiage of advocates and parties), unless it be the little importance of the cause, compared with the delay, expense, and vexation, attached to the registration of it? And do you not know, that the use aimed at by the

distinction, and by the consequences grounded on it, were to secure the judges that invented it against the competition of judges below them, and on one side of them? and that, among the civil courts not of record, the equity courts, the courts which reject, as "beneath their dignity," all causes of less than 10*l*. value, are at the head of the list?

So much as to the safeguards against misdecision. For the avoidance of unnecessary vexation, an important maxim remains to be brought to view.

I suppose the ends of justice substituted to the ends of judicature. I suppose hypocrisy unmasked. I suppose honest eyes opened; imbecility in honest guidance. I suppose the door thrown wide open, not only to all willing testimony, but to all lights that are to be elicited from interrogatories administered to unwilling testimony: to unwilling testimony, whatsoever be the now terrible, the now tremendous, fruits of it: lights collected without reserve from unwilling witnesses, although the result should be the diminishing the multitude of misdeeds of all kinds, and diminishing (if English lawyers and their dupes endure to see it diminished) the barbarity, as well as imbecility, of their penal code.

In throwing open the door to self-criminative evidence, one exception, though but a temporary, and thence a limited and continually expiring, one, would require to be made. No admission of such evidence against offences anterior to the promulgation of the law: the reform should not be retrospective.

The reason is almost too obvious to bear

mentioning. Transgressions already committed are beyond the reach of prevention: punishment would be misery in waste.

Not that, because the case were called a criminal one, there would be any thing gained to general utility by extending the provision to the exclusion of satisfaction on the score of injury: viz. where the author of the injury cannot be a loser but the sufferer by it must be (and to the same amount) a gainer. But under the existing technical system, such is the structure of the established forms, that if the examination of the defendant remained forbidden to the one purpose, it would remain alike forbidden to the other.

To the abuse here in question, no correction would, could, or ought to be administered, but in the way of statute law. To render the correction retrospective, would include in it an operation of *ex post facto* law. Legislators shrink with uniform horror from the idea of such injustice. Jurisprudential law, from first to last, was formed by it. Not a step can she take on any fresh ground, not a fresh step can she take in any direction, that is not stained by injustice of this description.

## CHAPTER X.

## RECAPITULATION.

AGAINST the following errors it concerns the judge to be upon his guard.

1. The supposing that there is any man, of whose testimony it is certain that it will throughout be true: true to the purpose of warranting the judge to treat it as conclusive, *i. e.* exclusive of all counter-evidence.

2. The supposing that there is any man, of whose testimony it is certain that it will throughout be untrue: viz. to the purpose of warranting the judge in refusing to hear it. Not that the certainty of its being throughout untrue, would induce any thing like a certainty of its being throughout uninformative.

3. The supposing that there exists any *one* sort of interest, which, on the occasion in question, can be sure so to overpower the force of the standing tutelary interests, as to render untruth on the part of the testimony certain in any part, much less in the whole.

4.—or any *number* of interests acting in a mendacity-promoting direction.

5. The supposing that because, as to this or that fact, the testimony in question is incontestably false, and even mendacious,—that therefore there is a certainty of its being false as to this or that *other* fact: much more as to all the other facts.

6. The supposing that, where there are divers interests to the action of which the testimony is exposed on either side, there is any one of them that ought to be neglected, as if destitute of force.

7. The supposing that, where there are divers interests acting on the same side, the aggregate force with which they act is to be learnt by counting them, without regard to the separate force of each.

The above propositions are the general result of this work.

The anatomical view (shall we say) above given of the human mind, does it quadrate with the truth? No person by whom this work can ever be taken in hand, no person, male or female, high or low, rich or poor, but is competent to judge.

But if it be, what must we say of the picture given of it in the books of jurisprudence? of the picture of it, as referred to, and wrought from, on every jurisprudential bench?

Judging of it from those books and those benches, is this branch of practical science (if science it is to be called) in any better state than the science of anatomy, when the circulation of the blood was unknown, and nerves and tendons were confounded under one name? or than chemical science, when the great Plowden, no less profound in chemistry than in jurisprudence, gave in the pedigree of the metals, certifying them to be the issue in tail lawfully begotten by Stephen Sulphur upon the body of Mary Mercury?

By way of contrast to the above proposed mementos, and that the reader in whose understanding there is any predilection for

reason, or in whose heart any concern for the welfare of mankind, might take his choice, — it had been in my intention to subjoin a view of those documents to which English judges are at present in the habit of resorting for their guidance, and which, (in addition to, or, in explanation of, the particular decision, the supposed purport of which has been preserved by chance,) the advocates on each side are wont to present them with in that view.

These documents would range themselves naturally into two classes: — 1. Considerations purely technical, *i. e.* having no reference to any thing that will bear the name of reason: 2. *Fragmenta rationalia*; considerations containing in them more or less of the matter of reason. Fragments they cannot but be called; inasmuch as, containing, almost without exception, no reason but on one side, nor of that any thing better than a loose and broken hint, they can never, in any instance, be considered as amounting to an entire reason, but only to a quantity of rough matter, by the help of which, with due management, a reason might be made.

Of this research, what, it may be asked, would be the use?

Illustration; illustration merely. Amusement, and nothing more: or, if any thing beyond amusement, this: that the portentous worthlessness and depravity of the technical system, and of that sort of trash which among lawyers goes by the name of science, may be placed in yet another point of view: that, of the mountain of their nonsense, the relative as well as absolute magnitude may be measured by the molehill dimensions of such part of their

productions as, without abuse of language, may be capable of passing under the name of sense.

To engage in any such research, in the hope of any instruction, which in any other point of view could afford payment for the labour, would be to scrutinize the contents of the first great dunghill that presented itself, for the possible pearls or diamonds that might be to be found in it. It would at the best be like the reading over and studying the Bibliotheca of Alchemy, in the expectation of meeting with instruction applicable to the advancement of modern chemistry. In the course of a twelvemonth, it is not impossible but here and there a result might be found presenting a fact of which no modern chemist is apprized. But, in less than a thousandth part of the time thus spent in the purlieus of folly and imposture, facts of more use and importance might be brought to certainty, and for the first time, by following the track already opened by genuine and unpolluted science.

To subjoin a view of these lawyer's reasons, technical and semi-rational, to the present work, had, as already observed, been my intention. But, considering the bulk to which the present publication has already swelled, the completion of what may be found to say on this topic must be postponed. As for specimens, they have been already seen: technical considerations in the chapter on restoratives and elsewhere; *fragmenta rationalia* in some of the reasons for the exclusion of self-disserving evidence, in the reasons for excluding the testimony of a wife against her husband, in the use made of the words necessity, course of trade, &c.

## CONCLUSION.

WE are now arrived at the conclusion of this work : a few leading considerations have been pressing upon our minds throughout the whole course of it. At present I speak particularly to Englishmen ; the application to other countries will not be difficult.

1. So far as evidence is concerned, (and the limitation need not be anxiously insisted on), the existing system of procedure has been framed, not in pursuit of the ends of justice, but in pursuit of private sinister ends,—in direct hostility to their public ends. It is time that a new system be framed, really directed to the attainment of the ends of justice.

2. The models, the standards, the exemplifications, of the proposed improved system, nay, of a perfect system, are not objects of a Utopian theory ; they are within every man's observation and experience : within the range of every man's view ; within the circle of every private man's family.

3. To find these models of perfection, an Englishman has no need to go out of his own country : for invention there is little work, for importation scarce any. English practice needs no improvement but from its own stores : con-

sistency, consistency is the one thing needful: preserve consistency, and perfection is accomplished.

4. No new powers, no tamperings with the constitution, no revolutions in power, no new authorities, much less any foreign aid, are necessary. All that is necessary (and this is necessary) is, that the laws made for the purpose should be made by the lawful legislator; not by a power subordinate to that of the legislator, taking advantage of his negligence, usurping his authority, legislating with inadequate means, in pursuit of sinister ends, on false pretences.

5. Nothing more is required, than the extending, in all causes and cases, to rich and poor without distinction, that relief which in certain causes and cases, and in certain districts, has been afforded to the poor: torn (by the appointed guardians and friends of the people) from the rapacity, or abandoned by the negligence, of their natural enemies.

6. It requires, indeed, the establishment of local judicatures: but even this is not innovation, (not that even innovation, where necessary, should ever be declined,) not innovation, but restoration and extension. *Restoration* of powers once in existence,\* before they were swallowed up by the framers of the existing system of abuse, under favour of their own resistless power, working by their own frauds, covered by their own disguises, in pursuit of their own sinister ends. *Extension*, the restoring, though with some increase of amplitude,

\* The Saxon County Courts.

to one half of the island, the fountains of justice so happily retained by the other.\*

An aphorism not unfrequently quoted, and seldom without approbation, is that of Machiavel, in which the taking the constitution of the country to pieces, for the purpose of bringing it back to its first principles, is spoken of as a wise and desirable course. In the character of a general principle extending to all states, and to every branch of the constitution of every state, it is founded on vulgar prejudice, and leads to mischief. It supposes a constitution formed all at once: a supposition scarce any where realized. It supposes experience worth nothing; and herein lies the great and mischievous absurdity. It supposes men in the savage state endued with perfect wisdom, but growing less and less wise as experience accumulates, and progress is made in the track of civilization. It supposes that, to make the British constitution better than it is, we ought to bring it back to what it was in the time of William III., or Charles I., or Edward I., or John, or William the Conqueror, or Alfred, or Egbert, or Vortigern, or Cassibelaunus; in whose reign it would still have exhibited a picture of degeneracy, if compared with the primeval golden constitution of New Holland or New Zealand.

In the case at present on the carpet, the supposed wisdom of the maxim may find an apparent confirmation. By doing away the work of five or six hundred years, and throwing back the system of procedure, as to the most fundamental

\* The Sheriff's Courts and Borough Courts in Scotland.

parts, into the state in which it was at the time of Edward I. and much earlier, a mountain of abuse might be removed, and even a near approach to perfection made. Why? Because in principle there is but one mode of searching out the truth: and (bating the corruptions introduced by superstition, or fraud, or folly, under the mask of science,) this mode, in so far as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places; in all cottages, and in all palaces: in every family, and in every court of justice. Be the dispute what it may,—see every thing that is to be seen; hear every body who is likely to know any thing about the matter: hear every body, but most attentively of all, and first of all, those who are likely to know most about it, the parties.

Under the first Normans, as under the Saxons, the parties were always present in court, whoever else was present. Each was allowed to appear for his own benefit; each was compelled to appear for the benefit of his adversary.

Under the first Normans, as under the Saxons, justice was within the reach of every man. He might have it, in many cases, without travelling out of his own hundred: in almost all cases, without travelling out of his own county. With, or even without, the assistance of a horse, most commonly he might betake himself to the seat of judicature, and return, without sleeping out of his own bed: at the worst, he might go one day, and return the next.

With minds of a certain texture, many points might perhaps be gained by quoting, as if it were an authority, this conceit of Machiavel. But to rest the cause of utility and truth upon prejudices and wild conceits, would be to give a foundation of chaff to an edifice of granite. In a work which, if true or useful for a moment, will be so as long as men are men, the humour of the day is not worth catching at any such price.

In point of fact, then, I mention it as mere matter of accident, and in point of argument as no better than an argument *ad hominem*, that the system of procedure here proposed, happens to be, in its fundamental principles, not a novel, but an old one: and I give it for good, not *because* it is old, but *although* it happens to be so. Parties meeting face to face, in courts near to their own homes: in county courts, and, where population is thick enough, in hundred courts or town courts.

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## NOTE

ON

## THE BELGIC CODE.

THE code recently promulgated for the kingdom of the Netherlands, forms in many respects, so far as regards the law of evidence, an advantageous contrast with most European systems of jurisprudence.

Its superiority is most decided in the department of *preappointed* evidence, particularly under the head of contracts: formalities being, as it is fit they should be, *prescribed*, but not *peremptorily* so. A contract, although informally drawn up, may yet, if signed by the parties, be received in evidence. There is also a system of registration for written contracts. It is an article of this code, that oral evidence is not admissible to prove the existence, or to disprove or add to or alter the contents, of a written contract in form; but to this exclusionary rule there are two curious exceptions, one in favour of the poor, the other in favour of the mercantile classes: if the property dependant on the contract do not exceed the value of one hundred florins.

or if the transaction which gave rise to the contract be a commercial transaction, oral evidence may be heard. These exceptions render the code more wise and just, but much less consistent.

In the department of testimonial evidence, the only absolute exclusions are those of the husband or wife of a party to the cause, and all relatives of a party in the direct line: but the relatives and connexions of a party in any collateral line (as well as those of the husband or wife of a party) to the fourth degree, are said to be *reproché* (in the Dutch version of the code, *gewraakt*); as are also the presumptive heir, or servant of a party, all persons directly or indirectly interested (pecuniarily) in the cause, and all persons who have been convicted of robbery, theft, or swindling, or who have suffered any *afflictive* or *infamizing* punishment.

It is probable, though not clearly apparent on the face of the code, that the words *reproché* and *gewraakt* refer to the old rule of the Roman law, by which the evidence of two witnesses is conclusive evidence (*plena probatio*) in certain cases: and the meaning of these phrases probably is, that a witness belonging to any of the classes above enumerated, shall not be considered a witness to that purpose, viz. the purpose of forming a *plena probatio*, in conjunction with one other witness. If this be the meaning of the apparently exclusionary rule, it tends, *pro tanto*, to diminish the mischievousness of the monstrous principle of law to which it constitutes an exception.

It seems that the parties themselves cannot be heard in evidence under this code; with this exception, however, that a party may be required to admit or deny his own signature; and several other exceptions closely resembling the *juramentum expurgatorium* and the *juramentum suppletorium* of the Roman law, which have already been explained.

Among the bad rules of Roman law which are adopted in this code, is that which constitutes the evidence of a single witness insufficient to form the ground of a decision. The place of a second witness may, however, in many instances, be supplied by a written document, which is in such cases termed a *commencement de preuve par écrit*.

A rule deserving of imitation in this code, is that which permits children under fifteen years of age to give their testimony without oath. Their title to credence evidently does not depend upon their capacity to understand the nature of a religious ceremony, but upon their power of giving a clear, consistent, and probable narrative of what they have seen or heard.

On the whole, this new code, so far at least as regards the department of evidence, may be pronounced, though still far from perfect, considerably better than either the English system, or the other continental modifications of the Roman law.—*Editor*.

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THE END.

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